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R E P O R T S
OF 170-52
DECISIONS
IN
THE SUPREME COURT
OF
THE UNITED STATES.

WITH NOTES, AND A DIGEST.

BY B. R. CURTIS,
ONE OF THE ASSOCIATE JUSTICES OF THE COURT.

VOL. XXI.

FIFTH EDITION,
REVISED WITH REFERENCE TO THE LATEST DECISIONS.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1870.

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DECISIONS
OF THE
SUPREME COURT OF THE UNITED STATES.
DECEMBER TERM, 1853.

JUDGES DURING THE TIME OF THESE REPORTS.

HON. ROGER B. TANEY, CHIEF JUSTICE.

HON. JOHN M'LEAN,

HON. JAMES M. WAYNE,

HON. JOHN CATRON,

HON. PETER V. DANIEL,

HON. SAMUEL NELSON,

HON. ROBERT C. GRIER,

HON. BENJAMIN R. CURTIS, AND

HON. JOHN A. CAMPBELL,

CALEB CUSHING, Esq., ATTORNEY-GENERAL.

WILLIAM THOMAS CARROLL, Esq., CLERK.

BENJAMIN C. HOWARD, Esq., REPORTER.

JONAH D. HOOVER, Esq., MARSHAL.

ASSOCIATE JUSTICES.

JOHN H. LEWIS, Appellant, v. SARAH DARLING.

16 H. 1.

To a bill to charge a legacy on land of a married woman, she is a necessary party.

If this court find a case has merits, but no decree can be made for want of a necessary party, the cause will be remanded to have such party made.

Whether a legacy is chargeable on real estate depends on the will of the testator, and if he has blended his realty and personalty into one fund, for this purpose, it is not necessary first to exhaust the personalty before resorting to the realty.

Though a court of equity cannot act directly on land not within its jurisdiction, it may compel the holder of the title, who is a party before it, to give effect to a lien.

APPEAL from the district court of the United States for the northern district of Alabama.

The following is the statement adopted by the court, in their opinion.

A bill was filed March 16, 1846, by the appellee against the appellant—alleging, that in the year 1822, one Samuel Betts, a citizen of the State of Connecticut, but transacting business at Havana, in the Island of Cuba, as a partner in the firm of F. M. Arredondo and Son, died at Havana, leaving a will in due form of law, proven [* 2] and admitted to record in that city, by * which he bequeathed to the complainant, Darling, a legacy of \$2,500. That Betts left but one child, his daughter Mary, who has since married the defendant Lewis—and that a tract of several hundred thousand acres of land, in the present State of Florida, was held and owned by the firm, of which Betts was a partner. That by a decree of the proper court of the State of Florida, Lewis, the defendant, has been declared, entitled to 60,000 acres of this land, in right of his wife, the daughter of said Betts, which is worth more than \$100,000; that Lewis had also received a deed of conveyance for 15,000 acres of land, valued at \$50,000, which was the property of Betts, as a partner of the firm. And, in addition to this, also received large sums of money belonging to Betts's estate. The bill prays, that Exhibit A, (a copy of Betts's will,) and exhibit B, (a copy of the answer of the defendant, Lewis, to a bill filed in the superior court of the district of East Florida, in the now State of Florida, by John Brush "*et al.*" v. Lewis "*et al.*") be considered parts of the bill. And propounds interrogatories to Lewis. 1. As to whether exhibit A is a correct copy of that which defendant, in the case against him in Florida, had set out in his answer there, as the will of Betts? 2. Whether the original will was in defendant's possession; if not, why, and where it was, and was it admitted to probate in Havana? 3. Whether defendant received any property, lands, or moneys, from the estate of Betts, and if so, whether it was the property of Betts, individually, or as a partner of the firm of Arredondo and Son, and what was its value? 4. Whether exhibit B was a true copy of the answer it purported to be? 5. Whether Joseph Fenwick (who by the will of Betts was appointed executor in the United States) did ever, or did then, reside in Alabama, or where he then resided? 6. What the value of the property was, received by defendant from Betts's estate; when was it received, and what was the rate of interest in Florida and in Cuba? And prays process to procure full answers to the interrogatories, and payment of the legacy, if it appear that the defendant has received from Betts's estate enough to satisfy the complainant.

On page 5 of Record, in complainant's exhibit A, will be seen the

appointment of Joseph Fenwick as the executor of Betts in the United States, and the legacy bequeathed, as stated in the bill. The residue of the testator's property, after a few minor dispositions, is devised to his only child, the wife of the defendant.

Exhibit B, which complainant makes a part of her bill, shows that the large tract of land mentioned in the bill did belong to the firm of Arredondo and Son, of which Betts was a member, and sets out how Lewis, by marriage with the * daughter, the [* 3] sole heir of Betts, became entitled to a portion of it. Lewis, in that answer, also states, with regard to the 15,000 acres mentioned in the bill in this case, that, being ignorant of the true rights of his wife, in the year 1831 he agreed with F. M. Arredondo upon the terms of a compromise as to his wife's interest in said lands; by which agreement he and his wife were to receive 15,000 acres, as an undivided portion of the balance of the tract, after certain sales which had been previously made by Arredondo and Son; and, in consideration of which, he and his wife were to relinquish forever, all rights to any further or other portion of said land, by virtue of the interest of Samuel Betts. That a deed was executed by said F. M. Arredondo, conveying to Lewis and wife, 15,000 acres of the land, and signed and delivered to Lewis, but that he and his wife had refused to execute any deed of release or relinquishment of their interest in said land—alleging as a reason for not doing so, that he ascertained Arredondo had not made full and fair representations of Betts's interest in the land, and had either by mistake, or with fraudulent purpose, made incorrect statements in the recitals of the deed of the sales previously made, and that he (the defendant) had therefore always regarded the said deed of Arredondo to himself and wife as void, and had claimed nothing under it since he ascertained the facts above referred to, and had always refused to carry out the verbal agreement of the compromise; and averring Betts's interest as partner to the extent of one third, in the large tract of land belonging to the firm of Arredondo and Son, he prays a decree for partition of said lands, and that the portion to which he is entitled in right of his wife, when established to the satisfaction of the court, be allotted to him by a decree to that effect.

On page 11 of record, is defendant Lewis's first answer to the present bill, in which he totally denies having ever received one cent of value from Betts's estate, either in real, personal, or mixed property. But this answer being objected to as insufficient and evasive, the court below, May 21, 1846, ruled that it was insufficient—but also ruled, that the bill did not allege sufficient matter for equitable relief it not showing that the executor had not paid the legacy, and if it

had not been paid, did not show any reason for proceeding against the residuary legatee instead of the executor.

Thereupon the complainant filed her amended bill, stating that "no one, to her knowledge or belief, had ever taken out letters testamentary or of administration upon the estate of Betts, either in the State of Alabama or elsewhere," and "that no person had ever paid the legacy, or any part thereof," and that no person but defendant had ever received any part of Betts's estate, and called upon defendant to state, whether any one had taken out letters upon the estate.

Defendant then puts in his second answer, stating that he was a defendant in a suit in chancery in Florida, brought against him and others by John H. Brush and others, and that before the termination of said suit, a copy of the will of Betts was filed by him as part of the evidence of his claim, in right of his wife. The original will was in Spanish, and he obtained a Spanish copy of it from the proper depository in the city of Havana. He believed that a Spanish copy and an English translation were filed among the papers in that suit. That the suit was not tried in the regular way — but the parties entered into a covenant or agreement, which was put upon the records of the court of Florida, and was, by consent, made the decree of that court. That the will was not adjudicated upon; — cannot say on his oath that the exhibit A is a correct translation of the original — but it does not differ from the English copy filed in the Florida case. To the third interrogatory, he states, that he has received no property, lands, or moneys from the estate of Betts. That a decree in the Florida case had been entered by consent of parties, and that the decree gave to his wife a large amount of land — but there was no decree in favor of him — and the decree in favor of his wife was not a final one — needing the report of commissioners appointed to make partition of the land before it became a final decree. Cannot say what is the value of the land decreed to his wife, because the decree is not final, and awaits the further action of the court. He admits the exhibit B to the bill to be a true copy of the answer filed by him in the Florida case. States that Joseph Fenwick did reside in Alabama, and believes he is dead; and that he does not know or believe that any person has taken out letters of administration upon the estate of Betts in the United States. He does not know whether there was or was not administration in Cuba — and has no information on the subject; and suggesting the want of parties, prays to be dismissed.

No exception to this answer appears on record; but on the 23d November, 1847, the court decide the answer to be insufficient, and

also that the bill was defective in not alleging sufficient matters for equitable relief, in not showing that the executors had not paid the legacy, and that not being shown in alleging no reasons for proceeding against the residuary legatee instead of the executor.

Leave to amend was granted; but instead of so doing, the complainant filed her replication, averring the sufficiency of her bill, the insufficiency of the answer, and traversing the statements of the latter.

Johnson and R. Johnson, Jr., for the appellant.

Butler, contra.

* WAYNE, J., delivered the opinion of the court. [* 7]

We have verified the statement of the pleadings in this case attached to the brief of the counsel for the appellant, by a comparison of it with the record, and shall adopt it for the purpose of giving our judgment upon this appeal.

Upon this statement, the counsel for the appellant urges five grounds for the reversal of the judgment.

1. It is said that the bill is materially defective for want of parties, that the wife of the appellant, through whom alone he claims, and whose rights he represents, ought to have been made a party.

2. That there is no allegation in the original or amended bill, that all the personal property of the testator had come into the hands of the appellant, or that so much of it as he may have received, was sufficient to pay the legacy claimed by the appellee, Sarah Darling.

* 3. That there is no averment in the bill that there was not [* 8] sufficient personal property to pay the legacy.

4. That the effect of the plaintiff's replication being an admission of the sufficiency of the defendant's second answer, there is no evidence to authorize the decree against the defendant.

5. If this be not the effect of the replication, yet the answer is distinct and full, and there is no evidence that any property belonging to the estate of Samuel Betts ever came into the hands of the defendant, and that he cannot be liable *de bonis propriis*.

We have given these points, because they raise every objection which can be made against the judgment of the court below, either upon the pleading or the merits of the case. We will discuss them successively.

The record certainly discloses the fact, that the wife of the appellant has such an interest in the controversy, that no decree can be

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given which will not affect it. She is the residuary legatee of her father, and all the property given by that clause of his will became hers immediately upon his death. The interest which the appellant may have in it was acquired from his marriage with her, after her father's death. It is strictly marital, and the extent of it during the coverture, or afterwards if he lives longer than his wife, depends upon the law of the sovereignty where the real estate may be, and, so far as the personal property is concerned, upon the investiture of it in the legatee according to the law of her father's domicile at the time of his death. Or it may depend upon the marriage contract, if any was made. We have not undertaken to say what that interest is, or may become. We have only intimated upon what it may depend; and will further say, that the children, in the event of their mother's death, may acquire an interest in the property, independently of their father's control. If she be already dead, then such of the children as are *sui juris* should be made parties to the plaintiff's bill. And if there are other children still minors, the court should have them made parties by a guardian of its appointment, excluding their father from such an office. As the case stands, it is not too late to amend the bill by making the proper parties. The rule in equity, permitting it to be done, is this; that on the hearing of a cause, even upon an appeal, an order may be made for the cause to stand over, with liberty to the plaintiff to amend by adding proper parties, if it appears that the plaintiff is entitled to relief, but that it cannot be given for the want of proper parties. The equity of the plaintiff is suffi-

ciently obvious in this case for the application of the rule.

[* 9] The proofs in the case show that she has a strong *claim upon the appellant for the payment of the legacy for which she sues him. It is manifest that the legacy has been made by the testator a charge both upon the real and personal estate which he means to give to his daughter. It will not do, then, to permit it to be defeated in this suit by any mistake or unskilfulness in pleading. We shall then reverse the judgment appealed from, in conformity with the first objection made against it. But we will remand the cause to the circuit court for further proceedings, and for the proper parties to be made.

The second and third objections are also exceptions to the sufficiency of the plaintiff's pleadings. It is said, that there are no averments in the bill, that all the personal property of the testator had come into the possession of the appellant. And if any part had come, that it was sufficient to pay the legacy. And further, that the bill contains no averment that there was not sufficient personal property to pay the legacy. These objections are made upon the suppo-

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sition that the legacy, in this instance, cannot be charged upon the real estate of the testator, until it has been shown that there is not personal property enough to pay the legacy. That depends upon the intention, as it is to be collected from the residuary clause of the testator's will.

It is: "And as to all the rest and remainder of my property, debts, rights, and actions, of what kind and nature soever, that may belong or appertain to me, I name and appoint as my sole and universal heiress, the above-named Maria Margaret Betts, my lawful daughter, in order that whatever there may appear to appertain and belong unto me, she may have and inherit the same, with the blessing of God and my own." The testator's real and personal property are found blended by him in the clause together. He leaves to his daughter all of his property, of every kind, which may remain after the antecedent bequests and devises in his will have been paid and given to the objects of his bounty. His daughter is to have "the rest and remainder of his property, debts, rights, and actions, of what kind and nature soever." He had previously, in the will, declared that his property consisted of one third in the house established in this city under the firm of Fernando de la Maza Arredondo and Son, and that it would appear from the accounts, books, and other papers of the company. And he further declares that as both the debts due by him and to him will appear by the books of the company, that he confides it to his partners to collect and pay them. His executors were not to have any thing to do with the collection and payment of his debts.

Their office was to secure any surplus which there might be after his debts were paid, and to apply it according to his will, *in the manner required by the law of Cuba, where the [* 10] testator was domiciled at the time of his death. The testator then appoints an executor to fulfil his will in the United States, where he had no personal property. Now it does not appear that either of his executors in Cuba or in the United States ever undertook to administer the testator's estate under his will. Indeed, the reverse is to be taken for the fact, from the statement of the appellant. There can be, then, no personal property of the testator *eo nomine* in the United States over which a court of equity in the United States could have any control for the payment of the legacy.

Nor is this a suit against a party, properly representing the testator, for the application of his personal property to the payment of the legacies. Between the appellant and the testator there is no official privity to give to him any of those rights, or imposing upon him any of the obligations of an executorial trust. It is a suit against a de-

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fendant who is charged with having received large sums of money for which he is accountable, and which may be applied by a court of equity to the payment of the legacies bequeathed by the testator; and when that has been done, to the purposes of the residuary clause of his will. He is also charged with having under his control the real estate of the testator without the sanction or authority of the executor who was appointed to administer it in the United States. The proofs in the record show it to be so. In such a case such averments as are called for by the second and third objections are not necessary. If this were not so, the language of the residuary clause of the will would make such averments unnecessary. The testator has made bequests of money antecedently to that clause, without creating an express trust to pay them, and has blended the realty and personalty of his estate together in one fund in the residuary clause. That of itself makes his bequests of money a charge upon the real estate, excluding from it the previous devises of land to Fenwick, Wallace, and to John and Fernando Arredondo.

The rule in such a case is, that where a testator gives several legacies, and then, without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with legacies, for in such a case, the "residue" can only mean what remains after satisfying the previous gifts. Hill on Trustees, 508. Such is the settled law both in England and in the United States, though cases do not often occur for its application. Where one does occur, the legatee may sue to recover the legacy, without distinguishing in his bill the estate into the two kinds of

[* 11] realty and personalty, because *it is the manifest intention of the testator that both should be charged with the payment of the money legacies. Nor does this conflict at all with that principle of equity jurisprudence, declaring that generally, the personal estate of the testator is the first fund for the payment of debts and legacies. The rule has its exceptions, and this is one of them.

Ambrey v. Middleton, 2 Eq. C. Ab. 479; Hassel v. Hassel, 2 Dick. 527; Brudenell v. Boughton, 2 Atk. 268; Bench v. Biles, 4 Mad. 187; Cole v. Turner, 4 Russell, 376; Mirehouse v. Scaife, 2 M. & Cr. 695, 707-8; Edgell v. Haywood, 3 Atk. 358; Kidney v. Coussmaker, 1 Ves. Jr. 436; Nichols v. Postlethwaite, 2 Dall. 131; Hassanclever v. Tucker, 2 Binney, 525; Whitman v. Norton, 6 Binn. 395; McLanahan v. Wyant, 1 Penn. 111; Adams v. Brackett, 5 Met. 280; Van Winkle v. Van Houten, 2 Green, Ch. 172; Downman v. Rust, 6 Rand. 587; Lupton v. Lupton, 2 Johns. Ch. Rep. 618, has been supposed to conflict with this rule, but it does not do so, for

there it is said to be dependent upon the testator. The same is the case of *Dudley v. Andrews*, in 8 Taunt.; and *Paxson v. Potts*, in 2 Green, Ch. 313, is a case in point with this case.

We now proceed to the consideration of the fourth and fifth objections.

It is denied in these points that there is any evidence to authorize a decree in favor of the plaintiff, even if her bill had proper parties. We think differently. The appellant is charged in the bill with having obtained a decree in a court in Florida, in behalf of his wife, for sixty thousand acres of land; it being the real estate of her father, and that it was worth more than one hundred thousand dollars. He is also charged with having received large sums of money of the estate of the testator, and that he has refused to pay the plaintiff's legacy. He is not charged with having received the money *eo nomine* as the personal estate left by the testator, but as money received for which he is accountable to the estate. The difference between the two is obvious. He answers that he had not received, as yet, of the estate of the testator, one cent of value. And when he answers concerning the real estate, he does not deny, but admits that he had obtained a decree in the State of Florida for the land of the testator. His answers are made with such reserve that they must be considered as having been meant to keep from the plaintiff the discovery of what her bill seeks to obtain. The natural and candid reply of the appellant, from his unofficial connection with the testator's estate, should have been a disclosure of the condition of the real estate of the testator — what had been done with it by himself; what contracts had been made by himself in respect to it; whether any arrangement * or bargain had been made for the sale of any part [* 12] of it; whether any money had been received on account of it, or was to be paid to him. He should have made also a frank disclosure how the personal estate of the testator had been administered by the parties and executors of the testator, if they had administered it at all, and how and to what extent he had received, or arranged to receive it, as a part of his wife's interest in her father's estate.

This admission is found in his petition for a rehearing of this cause. In that he says that he has obtained a decree in the court of Florida, in behalf of his wife, for sixty-two thousand acres of the grant of land which had been made in 1817, to Arredondo and Son, containing two hundred and eighty-nine thousand six hundred and forty-five acres and five sevenths of an acre, of which the testator owned one third — that the grant had been confirmed and held to be valid by the supreme court of the United States; and that the grant had been located and surveyed under the authority of the government of the

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United States. Now it does not matter, for the purposes of this case, (the ownerships of the testator to one third of that grant having been admitted and proved,) that the writ of partition obtained for it by the appellant in Florida is only interlocutory, in the sense that it is not final until the partition shall be made and returned to the court. The ownership of the land is determined by the decree of the supreme court of the United States, and the testator's legacies have been made by him a charge upon it. The ownership of the testator of a part of that land cannot be affected by any proceedings, finished or unfinished, in the courts of Florida.

Further, there is proof in the record that the appellant has received for himself and his wife from Fernando M. Arredondo a conveyance for certain property which Betts, the testator, had conveyed to Arredondo and others in trust for the payment of sundry debts due at its date by the testator. Lewis, the appellant, obtains for his wife and for himself assignments from the creditors of the testator of their demands, and takes a reconveyance of the property. What that property is, does not appear, but whatever it may be it is liable, as well as the rest of the testator's property, for the payment of the legacy. Again, the appellant admits, and the proof is that he negotiated with the partners of the testator, for a conveyance of that portion of the Arredondo grant which was conveyed to the testator in behalf of his wife. It appears to have been made by Arredondo, but not to the extent of the testator's interest. On that account he rejected the deed tendered to him, and afterward obtained from the proper court in Florida a decree for 62,000 acres in behalf of his wife in that grant.

[* 13] * We shall not pursue this part of the case further. We are satisfied that the merits of the controversy were not misunderstood by the learned judge in the court below.

It appears, then, from the admissions and proofs in this case, that the appellant has substantially under his control a large property of the testator, which we think from his will that he meant to charge with the payment of the plaintiff's legacy, excluding, as we have said, the devises of land to Fenwick, Wallace, and Fernando, and Joseph Arredondo. We repeat that it is a charge upon the rest of the real as well as the personal property of the testator. But he states that the real estate is in another sovereignty than that in which the plaintiff has sued, and is therefore out of the jurisdiction of this court to make any decree concerning it. It is true that the court cannot, in such a case, order the land to be sold for the payment of any decree which it may make in favor of the plaintiff. But it is not without power to act efficiently to cause the defendants to pay any such decree.

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The land may be declared to be charged with the payment of the legacy so as to compel the parties who claim the same as the property of the testator to set off or sell a part of it for such purpose. And we further say, if, in the proceedings of the court below hereafter, it shall appear that the appellant has received or made arrangements to receive any fund or money equitably belonging to the testator, sufficient to pay her the plaintiff's legacy, that a decree may be made against him for application of it to that purpose.

We do not consider it necessary to say more in the case.

We shall direct the judgment of the court below to be reversed, for the want of proper parties, and that the court shall allow them to be made parties, with such other amendments to be made by the plaintiff to her bill as the court may judge have not been put in issue by the bill with sufficient precision, and that a master shall be appointed to report upon the testator's estate, and to take an account thereof.

—♦—

HENRY F. TURNER, JAMES F. PURVIS, and STERLING THOMAS, Plaintiffs in Error, v. JOSEPH C. YATES.

16 H. 14.

Though it may be necessary to leave the meaning and effect of a commercial correspondence to a jury, when it refers to material extrinsic facts, yet the question, whether a letter of advice, which accompanied a bill, showed, on its face, a drawing against a particular consignment, was for the court.

It often happens that a right may be asserted in the course of a trial upon one of two grounds, both of which cannot exist; and though it is the duty of the court to guard against surprise in this respect, yet this is a matter of practice, and of discretion, and not ground for a writ of error.

It is to be presumed that an invoice accompanied a consignment of merchandise to a foreign country.

A commercial correspondence, though between third persons, is often evidence of the nature of their transactions, and the relations they sustained to each other.

The record must show that an exception was taken at the stage of the trial when its cause arose, but the time and manner of placing the exception on the record may be regulated by the practice of the courts below.

A rule of the circuit court for Maryland, on this subject held unobjectionable.

THE case is stated in the opinion of the court.

Barroll and May, for the plaintiffs.

Johnson, (with whom was *S. T. Wallis*,) contra.

* CURTIS, J., delivered the opinion of the court.

[* 21]

This is a writ of error to the circuit court of the United States for the district of Maryland. The action was debt on the

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bond of the plaintiffs in error, the condition of which was as follows :—

Whereas the said Joseph C. Yates is about to lend and advance to William H. F. Turner the sum of \$12,000, in such sums and at such times as the said William may designate and appoint; [* 22] which designation, and appointment, * and advances, it is hereby agreed shall be evidenced by notes drawn by the said William in favor of the said Harry F. Turner, agent, and by the latter indorsed, or by drafts drawn by the said William H. F. Turner in favor of the said Harry F. Turner, agent, on, and accepted or paid by, the said Yates, indorsed by said Harry F.

And whereas the said Harry F. Turner, Sterling Thomas, and James F. Purvis, have agreed, as the consideration for the said loan, to secure the said Yates the payment of the sum of \$6,000, and interest thereon, part of the said loan; and the said Harry F. Turner, with Robert Turner and Absalom Hancock, have entered into a bond similar to this, for the payment of the other \$6,000 and interest.

Now the condition of the above obligation is such, that if the said William H. F. Turner, at the expiration of twelve months from the date hereof, shall well and truly pay to the said Joseph C. Yates, his executors, administrators, or assigns, all such sum or sums of money as may be owing to the said Yates, by the said William H. F. Turner, evidenced as aforesaid, at the said expiration of the said twelve months, or in case the said William H. F. Turner should fail or omit to pay said sum or sums of money, at said time, if the said Sterling Thomas and James F. Purvis, or either of them, shall well and truly pay to the said Yates, his executors, administrators, or assigns, so much of said sum or sums of money as may then be owing, as shall amount to \$6,000 and interest, in case so much be owing, with full legal interest thereon, or such sum or sums of money as may be owing with interest thereon, in case the same should amount to less than \$6,000, then this obligation shall be null and void, otherwise to remain in full force and virtue in law.

HARRY F. TURNER, [SEAL.]

STERLING THOMAS, [SEAL.]

JAMES F. PURVIS. [SEAL.]

The defence was, that seven hundred boxes of bacon had been consigned by William Turner to Gray and Co., in London, for sale, and having been sold, the whole of its proceeds ought to be credited against the advance of \$12,000, mentioned in the condition of the bond. The plaintiff did not deny that the merchandise was received by Gray and Co. for sale, and sold by them, but insisted that the property belonged to Harry, and not to William Turner, and so no

part of its proceeds were thus to be credited; and that, if bound to credit any part of these proceeds, there was first to be deducted the amount of a draft for \$5,733, drawn by Harry Turner on the plaintiff specifically against this property, which draft the plaintiff was admitted to have accepted and paid.

* Upon this part of the case, the district judge who pre- [* 23] sided at the trial ruled: —

“If the jury believe that defendants executed and delivered the bond now sued upon, and that Harry F. Turner, in the transactions, after occurring, in relation to the bacon at Chattanooga, was either the principal in such transactions, or acted as agent of William H. F. Turner, then defendants are entitled only to be credited for one half of the net amount of the shipments of bacon made by them, after deducting from the proceeds of sales of such bacon all liens thereon, including in such liens the draft of \$5,733 drawn as an advance on such bacon.”

This ruling having been excepted to, several objections to its correctness have been urged at the bar by the counsel of the plaintiffs in error.

The first is, that the bond does not show the advances were actually made, and, therefore, the judge ought to have directed the jury to inquire concerning that fact. It is a sufficient answer to this objection to state what the record shows, that, in the course of the trial, the plaintiff, having put in evidence drafts corresponding with those mentioned in the bond, amounting to \$12,000, the defendants admitted their genuineness, and that they were all paid at the times noted thereon. The fact that the \$12,000 was advanced was not therefore in issue between the parties, and there was no error in not directing the jury to inquire concerning it.

It is further objected, that in his instruction to the jury the judge assumed that the draft of \$5,733 was drawn against this consignment, instead of leaving the jury to find whether it was so drawn. The draft itself and the letter of advice were in the case. The draft requested the drawee to “charge the same to account as advised.” The letter of advice states: “I have this day drawn on you at ninety days for \$5,733, being ten dollars and fifty cents per box on 544 boxes singed bacon, &c.” This was a part of the merchandise in controversy. It was clearly within the province of the court to interpret these written papers, and inform the jury whether they showed a drawing against this property. When a contract is to be gathered from a commercial correspondence which refers to material extraneous facts, or only shows part of a course of dealing between the parties, it is sometimes necessary to leave the meaning and effect of

the letters, in connection with the other evidence, to the jury. *Brown v. McGran*, 14 Pet. 493.

But this was not such a case; and we think the judges rightly informed the jury that this draft was drawn against this property. Whether, being so drawn, it bound the property and its proceeds so that in this action its amount was to be deducted [* 24] * therefrom, depended upon other considerations, which are exhibited in the other part of the instruction. Assuming, what we shall presently consider, that there was evidence from which the jury might find that Harry, who drew the draft, was either himself the owner of the property, and so the principal, or if not, that he was the agent of William, there can be no doubt of the correctness of this instruction, unless there was something in the case to show that the owner of the consignment could not bind its subject by a draft made and accepted on the faith of it. This is not to be presumed; and if the two defendants, who were sureties on this bond, assert that they had a right to have the whole of the proceeds of this property appropriated to the repayment of the advance of \$12,000 for which they were in part liable, it was incumbent on them to prove that the ordinary power of a consignor, by himself or his agent, to draw against his property, with the consignee's consent, was effectually restrained by some contract with the sureties, or of which they could avail themselves. We have carefully examined the evidence on the record, and are unable to discover any which would have warranted the jury in finding such a contract.

The bond itself contains no intimation of it. And, although the evidence tends to prove that the sureties had reason to expect that bacon would be packed and sent to Gray and Co., and that, through such consignments, the advance of \$12,000 might be partly or wholly repaid, they do not appear to have stipulated or understood that William was to have no advance on such property. Indeed, the real nature of the transaction seems to have been that the bond was taken to cover an ultimate possible deficit, after the property should have been sold and all liens satisfied; leaving William, their principal, free to create such liens as he might find expedient in the course of the business.

We are also of opinion that there was evidence in the case, from which the jury might find that Harry was held out to the plaintiff, by William, as his agent, as well for the purpose of drawing against this property as for other purposes. The letter from William Turner to the plaintiff, of the 14th November, 1849, and the agreement of Harry, appended to it, tend strongly to prove this. They are as follows:—

" Chattanooga, Tenn., Nov. 14, 1849.

" MR. JOS. C. YATES:—

" Dear Sir: In consideration of the advance of twelve thousand dollars made me by you for the purpose of packing meats for the English market, I hereby bind myself to make my whole shipments, of whatever kind they may be, to your friends in * London or Liverpool, Messrs. B. Charles T. Gray and Son, [* 25] for the entire season, or longer, till such advance shall have been paid off, together with any other that I may be permitted to draw for.

" I am, dear sir, your most obedient servant,

" W. H. F. TURNER.

" I agree to see the above carried out in good faith, and bind myself for the due fulfilment of it.

" HARRY F. TURNER, Agent of

" W. H. F. TURNER."

It thus appears that further advances to William were contemplated as a part of the arrangement with him; and Harry, as agent of William, was to see the whole arrangement carried out upon his personal responsibility. If, as these witnesses show, Harry was agent for William, for carrying out the whole arrangement, and further drawing was contemplated as a part of it, it necessarily follows he was his agent thus to draw. It is shown by the correspondence that Harry had the sole charge of getting the property down to the sea-board from the interior, and of shipping it; and that he had incurred large debts on account of it; and, finally, William Turner has not, so far as appears, repudiated his act in drawing, and the defendants now claim the benefit of a consignment, on the faith of which the draft in question was accepted.

Under these circumstances, our opinion is, that it was not improper for the judge to leave it to the jury to find whether Harry was the agent of William, if he were not himself the owner of the property. Nor do we think these two states of fact present such inconsistent grounds as ought not to have been submitted to the jury. It is true, Harry could not be at the same time principal and agent; but it often happens in courts of justice, that a right may be presented in an alternate form or upon different grounds.

If one party has dealt with another as an agent, it would be strange if the transaction should be held invalid because it is proved on the trial he was principal—and *è converso*. The substantial question, in such a case, is a question of power to do an act; and this power may be shown, either by proving he had it in his own right, or derived it from another. Of course, there may be cases

where the allegations of the parties on the record restrict them to one line of proof; and there may be others in which the court, to guard against surprise, should not allow a party to open one line of proof, and in the course of the trial abandon it and take an inconsistent one. But this last is a matter of practice, subject to the sound discretion of the court, and not capable of revision here upon a writ of error.

[* 26 * We hold the second instruction, which involved the merits of the case, to be correct.

The other bills of exception relate chiefly to questions of evidence.

In the course of the trial, the defendants introduced a witness who testified that he made out an invoice of the 700 boxes of bacon, and sent it by mail to the plaintiff, who was the agent of Gray and Co., to whom the property was consigned in London.

The defendants then called on the plaintiff to produce this invoice under the following agreement:—

“It is agreed between the plaintiff and defendant in this cause, that either party shall produce, upon notice at the trial table, any papers which may be in his possession, subject to all proper legal exceptions as to their admissibility or effect as evidence; and that handwriting, where genuine, shall be admitted without proof.

“S. T. WALLIS, for plaintiff,

“BENJ. C. BARROLL, for defendants.”

The plaintiff said the invoice was not in his possession. The defendants then offered to prove its contents. But the court was of opinion it was to be presumed the invoice had gone to the consignees in London, who were competent witnesses to produce the original; and, therefore, parol evidence of the contents of the paper was excluded.

This ruling was correct. So far as appears, this was the only invoice made. Every consignment of merchandise, regularly made, requires an invoice. It is the universal usage of the commercial world to send one to the consignee. The revenue laws of our own country, and we believe of all countries, assume the existence of such a document in the hands of the consignee on the arrival of the merchandise. It was the clear duty of the plaintiff, when he received the invoice, to send it to the consignees in London. The presumption was, that he had done what is usually done in such cases, and what his duty required. If the paper was in the hands of the consignees in London, secondary evidence was not admissible. For it was not within the written agreement to produce papers which applied only to those in the possession of the plaintiff; and though the plaintiff was an agent of those consignees, and seems to have been

suing for their benefit, yet, aside from the written agreement, they must be treated either as parties or third persons. If as parties, they were entitled to notice to produce the paper; if as third persons, their depositions should have been taken, or some proper attempt made to obtain it. This also disposes of the fifth exception; because, if the evidence in the cause had some tendency to prove the document had been retained, the offer of the plaintiff to prove the contrary, and the election by *the defendants to rest their motion for [* 27] the admission of the parol evidence upon a concession that the fact was as the plaintiff offered to prove it, instead of first calling for that proof, must preclude them now from objecting that the proof was not given.

The second exception relates to the admission of certain correspondence respecting this property, between the plaintiff and Harry Turner and Messrs. Gadsden and Co., of Charleston, S. C., before the property was shipped to London, and also the accounts of sales of the property, which were introduced by the plaintiffs for the purpose of showing that they were dealing with Harry Turner as principal, and under a separate contract with him. We have no doubt of the admissibility of this evidence for the purpose for which it was offered. Whether Harry was principal or agent, it was competent and important for the plaintiff to prove that he was dealt with and treated as a principal; and there could be no better evidence of it than the correspondence concerning the transaction. On the trial of a commercial cause, such a correspondence is not only generally admissible, but it is often the highest evidence of the nature of the acts of the parties and the capacities in which they acted, and the relations they sustained to each other. It must be observed that the plaintiff, in one aspect of his case, had three things to prove. First, that there was a distinct arrangement with Harry to ship property to Gray and Son, and receive advances on it. Second, that the plaintiff and Gray and Son acted on the belief that this consignment was made under that arrangement. Third, that, in point of fact, this consignment was made by Harry on his own account, and not on account of William. And evidence showing that Harry, being in possession of the property, consigned it to them, accompanying or preceded by such letters as showed the consignment to be for his own account, was clearly admissible upon each of these points. It is true it might, nevertheless, be the property of William, and really sent for his account; but that was a question for the jury upon the whole evidence.

The third exception relates to the admission of the testimony of Mr. Thomas, respecting certain declarations made to him by Mr.

Ward. We do not deem it necessary to detail the evidence, it being sufficient to say that, so far as these declarations were made in the presence of all the defendants, they were of such a character, and made under such circumstances, as imperatively to have required them to deny their correctness if they were untrue; and therefore they were clearly admissible. So far as Mr. Ward's declarations were made to Mr. Teackle, when the defendants were not present, they are stated to have been merely a repetition of his former statements.

[* 28] * The judge left them to the jury, with the following instruction:—

“ If the jury find that W. J. Ward, Esq., was, in his communication with the plaintiff's counsel, accompanied by the defendants, and that defendants referred plaintiff's counsel to said Ward to adjust and settle the differences between them, that said defendants are bound by the acts and declarations of said Ward, although he was only retained by H. F. Turner as such, unless such limitations of retainer were stated to plaintiff or his counsel.”

This was sufficiently favorable to the defendants. It was really of no importance whether Mr. Ward was counsel for one or all the defendants, if they united in referring Mr. Thomas to him to adjust the mode of preparing the papers; and, in our opinion, there was evidence from which the jury might find such an authority to have been given by the defendants jointly.

We consider the fourth exception untenable. If it was usual to pay a commission for such services, it was properly charged in this case, there being no evidence to show that there was a special agreement to render the services without pay, or for less than the customary commission.

The sixth exception was taken on account of the admission of the testimony of Mr. Teackle, and certain letters of Gray and Co. and Harry Turner. The former has already been disposed of in considering the third exception, and the latter in considering the second exception respecting the correspondence of Harry Turner, most of the observations upon which are applicable to these letters.

The remaining bill of exceptions is in the following words:—

“ Upon the further trial of this case, after the instructions prayed for had been argued, and the court had decided to refuse the same, and had granted the two instructions set out on the defendants' seventh exception, the defendants' counsel having prepared out of court their exceptions thereto, and to the other points of law ruled by the court and excepted to during this trial immediately after the court had so decided, and before the bailiff to the jury was sworn, or

the jury had withdrawn from the bar of the court, presented their said exceptions, and moved the court to sign and seal the same before the verdict should be rendered; but the court refused so to do, and refused to consider the said exceptions, or either of them, under the rule of that court, November 25, 1846, at the November term thereof.

“Ordered, that whenever either party shall except to any opinion given by the court, the exception shall be stated to the court before the bailiff to the jury is sworn, and the bill of exceptions afterwards drawn out in writing, and presented to the court during the term at which it is reserved, otherwise it will not be sealed by the court.”

In *Walton v. The United States*, 9 Wheat. 657, this court [* 29] said: “We do not mean to say, (and in point of practice we know it to be otherwise,) that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial and noted by the court with the requisite certainty, and it may afterwards, according to the rules of the court, be reduced to form and signed by the judge; and so in fact is the general practice. But in all such cases the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if it had been reduced to form and signed during the trial; and it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exception are allowed has always been considered as restricted to matters of exception taken pending the trial and ascertained before the verdict.”

To what was there said this court has steadily adhered; 4 Pet. 106; 11 Pet. 185; 4 How. 15. The record must show that the exception was taken at that stage of the trial when its cause arose. The time and manner of placing the evidence of the exception formally on the record, are matters belonging to the practice of the court in which the trial is held. The convenient dispatch of business, in most cases, does not allow the preparation and signature of bills of exceptions during the progress of a trial. Their requisite certainty and accuracy can hardly be secured, if any considerable delay afterwards be permitted; and it is for each court in which cases are tried to secure, by its rules, that prompt attention to the subject necessary for the preservation of the actual occurrences on which the validity of the exception depends; and so to administer those rules that no artificial or imperfect case shall be presented here for adjudication. The rule of the circuit court for the district of Maryland is unobjectionable, and this exception is overruled.

The judgment of the circuit court is affirmed, with costs.

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JOHN C. YERGER, Appellant, v. WILLIAM H. JONES, and ROBERT S. BRANDON, Executors of WILLIAM BRANDON, deceased.

16 H. 30.

A guardian, for the purpose of paying a debt due to his ward, agreed with a third person to exchange certain property of his own for other property of that person, and to take the title to his ward, and died before the contract was executed; the ward cannot recover back what had been delivered. He must either look to the estate of his guardian, or complete the contract and take the property.

APPEAL from the district court of the United States for the northern district of Alabama. The case is stated in the opinion of the court.

Johnson, and *R. Johnson, Jr.*, for the appellant.

Badger, contra.

[* 35] * GRIER, J., delivered the opinion of the court.

The appellant, John C. Yerger, a minor, suing by his next friend, filed his bill against William Brandon, setting forth that the father of complainant died in the State of Tennessee, leaving him his only child and heir at law; that his father made a nuncupative will, by which James W. Camp. was appointed guardian [* 36] of complainant; that Camp, acting as such, took possession of his property, and removed to the State of Alabama, where he died in 1845, insolvent. That at the time of his death, Camp was largely indebted to his ward for the use and hire of his slaves, and stated an account admitting the sum of about six thousand dollars to be due. That Camp contracted with Brandon to purchase a tract of land, for the use of his ward, for the price or sum of \$8,000. That Camp paid to Brandon about five or six thousand dollars on account of such purchase, by a sale of certain property under a deed of trust. That Camp had no right, as guardian, to convert the personal property of his ward into real estate; that the price agreed to be paid for the land was exorbitant, and a large balance is still due on said contract, which the complainant is unwilling to pay in order to obtain the title. He therefore prays the court to rescind and annul the contract, to take an account of the payment made by Camp and Brandon, and decree that the amount be restored to the complainant.

The answer denies that Camp was the legal guardian of complainant, but admits that he lived in the family of Camp after he came to Alabama, and apparently under his control. That the purchase made by Camp was for a fair price, and the property transferred by

him, in part payment, was the property of Camp and not of complainant; and that the contract was made without any view to injure or defraud the complainant, and did not have that effect; and that respondent is ready and willing to convey the tract of land to complainant, on receipt of the balance of the purchase-money.

The evidence in the case does not show that Camp was appointed guardian of the complainant by his father's will or by any competent legal authority, either in Tennessee or Alabama. But it appears that when Camp came to Alabama, that the complainant lived in his family, and that Camp acted as his guardian, having control of his person and of his property, which consisted of negroes. Camp had a farm of 960 acres in Alabama, and employed the negroes of complainant to work for him, and was largely indebted to him on account thereof. He was indebted also to Brandon, and his farm was subject to a deed of trust or mortgage. To satisfy this mortgage the land was sold and bid in by Brandon for the sum of \$4,500. Some negroes belonging to Camp were also included in the mortgage, and were bid in for the sum of over \$2,000 for the use of Yerger, (the complainant,) and paid for by Camp. An agreement was also made between Camp and Brandon, that Brandon should convey the farm purchased by him to the complainant, on receiving the sum of eight thousand dollars, being the amount of * the [*37] purchase-money advanced by Brandon and of the debt due by Camp to him. To secure the payment of this sum, Camp gave Brandon a bill of sale, or trust deed, for a large amount of personal property, consisting of 350 acres of cotton, 450 acres of corn, 300 hogs, besides horses, mules, farming utensils, &c. Brandon was to sell this property, and apply it in payment of this contract for the land, after deducting reasonable compensation for his trouble and expenses. The defendant, in his answer, admits the amount of sales under this trust to be \$5,235.24; deducting charges and expenses, \$1,868.48, leaves a balance applicable to the purchase-money of the farm, of \$3,365.75.

The bill does not allege that there was any fraud or collusion between the parties to this transaction, or any intention to injure the complainant. Nor would the evidence in the case support any such allegation. Brandon was endeavoring to secure his own debt in a manner least oppressive to Camp, by an arrangement which would leave him in possession of the farm on which he resided. Camp was endeavoring to save something for his ward, to whom he was indebted, out of the wreck of his estate. By this transaction the remains of his personal estate was vested in a valuable property, for the use of his ward, and put out of the reach of other creditors, with

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the incidental advantage to himself of retaining a home to himself and family. He was not converting the property of his ward to his own use, or to pay his own debts by collusion with Brandon, but was applying his own personal property in the best manner he could, to secure his ward from loss. His death has prevented his good intentions from being fulfilled to the extent contemplated. It is not easy to perceive on what principle of equity or justice the complainant can invoke the aid of a court of chancery to rescind and annul this contract, and compel the defendant to refund the amount paid by Camp on it. It is true a guardian has no power to convert the personal property of his ward into realty. Nor is the ward bound to fulfil or perform the contract made with Brandon. He has a right to hold his guardian accountable for the balance due him, and repudiate the contract made for his use. Or he may elect to take the land bargained for, but cannot demand a title from Brandon without payment of the balance due on the contract.

In Alabama, and some others of the States, a guardian cannot sell even the personal property of his ward without the leave of the court. By the common law, and in those States where it has not been modified by statute, he is considered as having the legal power to sell or dispose of the personal property of his ward, and a purchaser who deals fairly has a right to presume that he acts [*38] for the benefit of his ward, and is not bound to *inquire into the state of the trust, nor is he responsible for the faithful application of the money, unless he knew, or had sufficient information at the time, that the guardian contemplated a breach of trust, and intended to misapply the money, or was in fact, by the transaction, applying it to his own private purpose. The cases on this subject are reviewed by Chancellor Kent in *Field v. Schieffelin*, 7 Johns. Chan. 150. In order to follow trust funds which have been transferred to third persons, there must be a breach of trust in their transfer, and a collusion by the purchaser or assignee with the guardian, executor, or trustee.

If Brandon had taken the negroes belonging to plaintiff from his guardian, in payment of his debt, knowing the guardian was insolvent, and abusing his trust, a court of equity would compel him to return them to the ward, or pay their full value. But, in the case before us, Camp was dealing with his own property, and there is no pretence of any collusion with him by Brandon in the abuse of his trust. He has received nothing which belonged to the ward, or which he is under any obligation to restore to him.

So far as the interests of the complainant were affected by this transaction, the object of it was to benefit, not to injure him. He

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may therefore assume the contract, and demand a specific execution of it from the defendant, but has shown no right to rescind it and recover the money advanced in execution of it.

The decree of the court below is, therefore, affirmed.

FREDERIC D. CONRAD, Plaintiff in Error, v. DAVID GRIFFEY.

16 H. 38.

Contradictory statements by a witness cannot be given in evidence to impeach him, unless he has been asked whether he made such statements to the persons to whom it is attempted to be shown he did make them; and this rule applies where the witness testifies by deposition, and the contradiction was by a letter.

THE case is stated in the opinion of the court.

Benjamin, for the plaintiff.

Gilbert, contra.

*M'LEAN, J., delivered the opinion of the court.

[* 45]

This is a writ of error to the circuit court of the United States, for the eastern district of Louisiana.

This action was brought to recover the balance of three thousand *seven hundred and eighty-one dollars and fifty- [* 46] eight cents, claimed to be due under a contract to furnish, deliver, and set up, on the plantation of the defendant, in the parish of Baton Rouge, a steam-engine and sugar-mill boilers, wheels, cane carriers, and all other things necessary for a sugar-mill; all which articles were duly delivered.

The defendant in his answer set up several matters in defence.

The error alleged arises on the rejection of evidence offered by the defendant on the trial before the jury, and which appears in the bill of exceptions. The plaintiff read in evidence the deposition of Leonard N. Nutz, taken under a commission on the 28th of June, 1852, and filed the 9th of July succeeding. The defendant then offered in evidence a letter of the witness dated at New Albany, on the 3d April, 1846, with an affidavit annexed by him of the same date, addressed to the plaintiff Griffey. As preliminary proof to the introduction of said letter, the defendant adduced the bill of exceptions signed upon a former trial of this cause, and filed on the 23d February, 1849, showing that the letter had been produced by the plaintiff in the former trial, and read by his counsel in evidence as the letter of Nutz, in support of a former deposition made by him. And the said letter and affidavit were offered by the defendant to

contradict and discredit the deposition of the witness taken the 28th June, 1852; but upon objection of counsel for the plaintiff, that the witness had not been cross-examined in reference to the writing of said letter, or allowed an opportunity of explaining the same, it was rejected.

At the former trial, the letter was offered in evidence by the plaintiff in the circuit court, to corroborate what Nutz, the witness, at that time had sworn to; and the letter was admitted to be read for that purpose by the court. On a writ of error, this court held that the circuit court erred in admitting the letter as evidence, and on that ground reversed the judgment. *Conrad v. Griffey*, 11 How. 492.

The rule is well settled in England, that a witness cannot be impeached by showing that he had made contradictory statements from those sworn to, unless on his examination he was asked whether he had not made such statements to the individuals by whom the proof was expected to be given. In the *Queen's case*, 2 Brod. & Bing. 312; *Angus v. Smith*, 1 Moody & Malkin, 473; 3 Starkie's Ev. 1740, 1753, 1754; *Carpenter v. Wall*, 11 Adol. & Ellis, 803.

This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the state-
[*47] ments *referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony.

This rule is generally established in this country as in England. *Doe v. Reagan*, 5 Blackford, 217; *Franklin Bank v. Steam Nav. Co.* 11 Gill & Johns. 28; *Palmer v. Haight*, 2 Barbour's Sup. Ct. R. 210, 213; 1 McLean, 540; 2 *ibid.* 325; 4 *ibid.* 378, 381; *Jenkins v. Eldridge*, 3 Story, 181, 284; *Kimball v. Davis*, 19 Wend. 437; 25 *ibid.* 259. "The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible, if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission." "Such evidence is always inadmissible until the witness, whose testimony is thus sought to be impeached, has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

This rule equally applies whether the declaration of the witness, supposed to contradict his testimony, be written or verbal. 3 Starkie's Ev. 1741.

A written statement or deposition is as susceptible of explanation

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as verbal statements. A different rule prevails in Massachusetts and the State of Maine.

The letter appears to have been written six years before the deposition was taken which the letter was offered to discredit. This shows the necessity and propriety of the rule. It is not probable that, after the lapse of so many years, the letter was in the mind of the witness when his deposition was sworn to. But, independently of the lapse of time, the rule of evidence is a salutary one, and cannot be dispensed with in the courts of the United States. There was no error in the rejection of the letter, under the circumstances, by the circuit court; its judgment is therefore affirmed, with costs.

SAUNDERS BURGESS, Plaintiff in Error, v. JOHN M. GRAY, THOMAS BURGESS, JR., AARON BURGESS, SIMEON BURGESS, JAMES BURGESS, JR., SAMUEL T. NORTHCUT, *alias* NORTHCRAFT, SILAS HUSKY, AARON A. SMIRL, GEORGE ARNOLD, AUSTIN M. JOHNSTON, GEORGE W. OGDEN, JOHN C. HARRINGTON, JOHN WATSON, LEWIS BUSH, and JAMES G. CROMME.

16 H. 48.

The state courts have no jurisdiction to try, or give any effect to, an inchoate French or Spanish title.

The act of March 3, 1807, (2 Stats. at Large, 440,) did not grant legal titles; it only enabled claimants of inchoate titles to obtain patents.

The act of April 12, 1814, (3 Stats. at Large, 121,) confirmed only titles which had been rejected merely for want of evidence of inhabitancy on the 20th of December, 1803; and as it does not so appear, in reference to the plaintiff's title, he can take nothing under that act.

The mere possession of public land is no title against a grantee under the United States.

THE case is stated in the opinion of the court.

Garland, for the plaintiff.

Darby, contra.

*TANEY, C. J., delivered the opinion of the court. [*61]

This was a suit brought by petition in the circuit court of Jefferson county, in the State of Missouri, by the plaintiff in error, against the defendants.

"The petition sets forth, in substance, that John Jarrott, *alias* Gerard, in 1780, with the consent and permission of the officers of the Spanish government, settled upon a tract of land in what is now Jefferson county, in the State of Missouri, and that he continued to inhabit and cultivate it until about 1796, when he was driven off by

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the Indians. His son Joseph succeeded him in the possession of the land, and continued to reside upon and cultivate it until he sold it to Kendall, in the year 1812. Kendall filed a notice of the claim with the United States recorder of land titles, who rejected it. The right of Kendall passed by descent to his heirs at law, who sold to the plaintiff, as appears by conveyances filed with the petition. It appears, moreover, that the plaintiff has always been in possession since the purchase of Kendall's heirs. A plat of the claim was laid down on the maps of the public lands, in the registrar's office, representing it as being reserved to satisfy the claim of John Jarrot's legal representatives. After the claim had been examined and rejected by the recorder of land titles, no further action appears to have been taken on the claim.

"In the years 1847-8, and 9, different portions of the same tract of land were entered at the registrar's office, by different individuals, under preëmptions allowed to them; the entries being made at different times, each person purchasing in his own right and in his own individual name, separate and distinct from the others. The several persons making these separate and different entries are made the defendants to this suit.

"The defendants demurred to the petition, and assigned as causes of demurrer: first, that the plaintiff showed no right, in his petition, to maintain the action; second, that separate and distinct causes of action against different persons were joined in the petition.

"The circuit court of Jefferson county, sustained the demurrers, and the plaintiff appealed to the supreme court of Missouri. The supreme court affirmed the decision of the circuit court, and the plaintiff has brought his case before this court, by writ of error, to reverse the decision of the supreme court of Missouri."

[* 62] * In proceeding to deliver the opinion of the court, it is proper to observe, that by the laws of Missouri, the distinction between suits at law and in equity has been abolished. The party proceeds by petition, stating fully the facts on which he relies, if he seeks to recover possession of land to which he claims a perfect legal title; and he proceeds in the same manner, if he desires to obtain an injunction to quiet him in his possession, or to compel the adverse party to deliver up to be cancelled evidences of title, improperly and illegally obtained, and he may, it seems, assert both legal and equitable rights in the same proceeding, and obtain the appropriate judgment.

This has been done by the plaintiff in error in the present case. His suit is brought according to the prayer of his petition to recover possession of land to which he claims title, and upon which, as he

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alleges, the defendants have unlawfully entered; and also to compel them to abandon (as he terms it) their illegal claim.

The demurrer admits the truth of the facts stated in the petition. And, consequently, if these facts show that he had any legal or equitable right to the land in question under the treaty with France,¹ or an act of congress, which the state court was authorized and bound to protect and enforce, he is entitled to maintain this writ of error, and the judgment of the state court must be reversed.

Now as regards any equitable and inchoate title which the petitioner may possess under the treaty with France, it is quite clear that the state court had no jurisdiction over it. For it has been repeatedly held by this court that, under that treaty, no inchoate and imperfect title derived from the French or Spanish authorities can be maintained in a court of justice, unless jurisdiction to try and decide it has first been conferred by act of congress. Certainly, no such jurisdiction has been given to any state court. And the supreme court of Missouri were right in sustaining the demurrer, as to this part of the petition, even if it had been of opinion, that the permit to settle on the land, and the long possession of it under the Spanish government, gave him an equitable right, by the laws of Spain, to demand a perfect and legal title. The court had no jurisdiction upon the question. And the judgment of the state court cannot be reversed unless the plaintiff can show that he had a complete and perfect title derived from the Spanish or French authorities; or a legal or equitable title under the laws of the United States.

The petitioner does not claim a perfect grant from the French or Spanish government; nor a patent from the proper officers of the United States. But he insists that the act of congress of March 3, 1807, 2 Stats. at Large, 440, vested in him a complete legal title, and needed no patent to confirm it.

* Undoubtedly congress may, if it thinks proper, grant a [* 63] title in that form, and it has repeatedly done so. And we proceed to examine whether the title, claimed by the plaintiff, was confirmed to him by the act referred to.

The plaintiff relies on the second section as a confirmation of his claim. But it evidently will not bear that construction when taken in connection with the whole act. For the fourth section directed commissioners to be appointed, who were authorized to decide upon all claims to land under French or Spanish titles in the territories of Louisiana or Orleans; and by the sixth section, whenever the final decision of the commissioner was in favor of the claimant, he was entitled to a patent for the land, to be issued in the manner provided for

¹ 8 Stats. at Large, 200.

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in that section. The eighth section required the commissioners to report to the secretary of the treasury their opinion upon all claims not finally confirmed by them — the claims to be classified in the manner therein prescribed. And it was made the duty of the secretary to lay this report before congress for their final determination.

This act of congress did not, *proprio vigore* vest the legal title in any of the claimants. For even when the decision of the commissioners was final in their favor, yet a patent was still necessary to convey the title. The report was made conclusive evidence of the equitable right, and nothing more. And when the final decision was against the validity of the claim, he was directed to report his opinion upon its merits; and congress reserved to itself the ultimate determination.

The powers and duties of the commissioner were subsequently transferred to the recorder of land titles. And this claim was presented to him in 1812, with the evidence upon which the claimant relied to support it. It is a claim under a settlement right derived from the Spanish authorities, and which the claimant insisted was within the provisions, and entitled to confirmation under the second section of the act of 1807.

The recorder reported against it. His report states that there was "possession, inhabitation, and cultivation in 1781, and eight following years, and again two or three years." He assigns no particular reason for rejecting the claim, but simply enters in his report "not granted."

And in this form it was laid before congress, together with the other claims not finally decided by the recorder in favor of the claimants. It does not therefore appear from the report whether it was rejected because, in the judgment of the recorder, the possession of ten consecutive years was not sufficiently proved; or because no evidence was offered (and none appears to have been offered) to prove that the party under whose title the claim was made was a resident of the territory on the 20th of December, 1803.

[*64] * On behalf of the petitioner it is contended, that the decision of the recorder was erroneous, and founded upon a mistake as to a matter of fact; and that it appears by the evidence returned with the report to the secretary of the treasury, that the possession spoken of was proved to have been for more than ten consecutive years before the 20th of December, 1803 — and not broken, as stated in the report.

This may be true. The recorder may have fallen into error. But it does not follow that plaintiff was entitled, on that account, to maintain his petition in the Missouri court. That court had no power to correct the errors of the recorder if he made any; nor to revise

his decision; nor to confirm a title which he had rejected. That power, by the act of 1807, was expressly reserved to congress itself; and has not been committed even to the judicial tribunals of the general government. The decision of the recorder against him is final, unless reversed by act of congress; and the petitioner can make no title under the United States, by virtue of the provisions in that act.

It is, however, insisted that if it was not confirmed by the act of 1807, it was made valid by the act of 1814. And this confirmation is claimed under the first section, which confirms all claims where it appears by the report of the recorder that it was rejected merely because the land was not inhabited by the claimant on the 20th of December, 1803.

But it is very clear that this act does not embrace it. The report of the recorder does not place its rejection merely on that ground. On the contrary, it would seem to place it upon the want of proof of continued residence upon the land for ten consecutive years; and upon none other.

It may, indeed, have happened that the son of John Jarrett was in possession, and actually inhabited the land on the day mentioned in the law; and that from ignorance of its provisions, or from other cause, he omitted to produce proof of it to the recorder, and that the claim was in fact rejected on that account. But that question was not open to inquiry in the Missouri court. The act of congress does not confirm all claims where this fact existed and could be proved, but those only in which it appeared on the face of the report that the want of this proof was the sole cause of its rejection. This must appear on the written report of the recorder to bring it within the provisions of this act, and cannot be supplied by other evidence. And as it does not so appear in the present case, the act of 1814 does not embrace it nor confirm it.

Neither can the petition be maintained upon the long and continued possession held by the petitioner and those under whom he claims.

The legal title to this land, under the treaty with France, was * in the United States. The defendants are in posses- [* 65] sion, claiming title from the United States, and with evidences of title derived from the proper officers of the government. It is not necessary to inquire whether the title claimed by them is valid or not. The petitioner, as appears by the case he presents in his petition, has no title of any description derived from the constituted authorities of the United States, of which any court of justice can take cognizance. And the mere possession of public land, without title, will not enable the party to maintain a suit against any one who enters on it; and

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more especially he cannot maintain it against persons holding possession under title derived from the proper officers of the government. He must first show a right in himself, before he can call into question the validity of theirs.

Whatever equity, therefore, the plaintiff may be supposed to have, it is for the consideration and decision of congress, and not for the courts. If he has suffered injury from the mistake or omission of the public officer, or from his own ignorance of the law, the power to repair it rests with the political department of the government, and not the judicial. It is expressly reserved to the former by the act of congress.

We see no error in the judgment of the supreme court of Missouri, and it must be affirmed, with costs.

18 H. 272.

JOSIAS PENNINGTON, Plaintiff in Error, v. LYMAN GIBSON.

16 H. 65.

An action of debt lies in the circuit court for Maryland, founded on a decree for the payment of money made by a court of equity, of general jurisdiction, in the State of New York. Every reasonable presumption is to be made in favor of a judgment or decree of a court of general jurisdiction.

The courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and with respect to them, no averment need be made in pleading, which would not be necessary within the respective States.

THE case is stated in the opinion of the court.

Schley, for the plaintiff.

Frick and Collier, contra.

[* 74] * DANIEL, J., delivered the opinion of the court.

The defendant in error, a citizen of the State of New York, instituted in the circuit court an action of debt against the plaintiff in error, a citizen of the State of Maryland, to recover the amount of a decree, with the costs thereon, which had been rendered in favor of the defendant against the plaintiff in error by the supreme court in equity in the State of New York. The averments in the declaration are as follows: That at a general term of the supreme court in equity of the State of New York, one of the United States of America, held at the court house in the village of Cooperstown, in the county of Otsego, in the State of New York, on the first Monday

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in November in the year 1848, present William H. Shankland (and others) justices, it was ordered, adjudged and decreed, by the said court, in a certain suit therein pending, wherein the said Lyman Gibson was complainant, and the said Josias Pennington (and others) were defendants, that the said Lyman Gibson recover against the said Josias Pennington, and that the said Josias Pennington pay to the said Lyman Gibson the amount of the consideration money paid by the said Lyman Gibson to a certain Samuel Boyer, as agent and attorney of the said Josias Pennington, as should appear by the several indorsements upon the contract mentioned and set forth in the bill of complaint, and produced and proved as an exhibit in said suit, with interest on the several payments and indorsements respectively, amounting in the aggregate on the 25th day of November, 1848, to the sum of \$5,473.18, and also that the said Josias Pennington pay to * the said complainant his costs in said suit, [* 75] which were taxed at the sum of \$661.68, as by the said decree duly signed and enrolled at a special term of the supreme court in equity aforesaid, held on the 30th day of April in the year 1849, at the village of Bath, in the county of Steuben, in the State of New York, and now remaining in the office of the clerk of Steuben county aforesaid, will on reference appear.

To the declaration as above stated, the defendant, the now plaintiff in error, demurred; and upon a joinder in demurrer, the court overruled the demurrer of the said defendant, and gave judgment for the plaintiff, the now defendant in error, for the debt and costs in the declaration set forth, together with costs of suit.

The defendant in the circuit court assigned for causes of demurrer the three following:—

1. For that it appears from the said declaration that the cause of action in this case is an alleged decree of an alleged court of equity, as set forth in the said declaration, whereas an action at law cannot be maintained in this court on such a decree; at least, without an averment in pleading that said decree within the limits of its territorial jurisdiction is of equal efficacy with a judgment at law.

2. For even if an action at law can be maintained for the recovery of the sums of money directed by such alleged decree to be paid, as stated in said declaration, yet the form of action adopted in this case is not the proper form of action for the enforcement of such a recovery.

3. For that it does not appear in and by the said declaration, nor is it averred in any manner, that the said alleged court of equity had any jurisdiction to pass a decree against this defendant for payment

to the plaintiff of any of the sums of money in the said declaration mentioned.

In considering these causes of demurrer, the attention is necessarily directed to the ambiguous terms assumed in the first assignment, by propounding a proposition general or universal in its character, and afterwards conceding a modification or change in that proposition inconsistent not merely with its scope and extent, but with its essential force and operation. For instance, it is first stated that "the cause of action is an alleged decree of an alleged court of equity, whereas an action at law cannot be maintained in this court on such a decree." We can interpret this proposition to have no other intelligible meaning than this, and to be comprehended in no sense more restricted than this, namely, that an action at law cannot be maintained in a court of law when the cause of action shall be a

decree of the court of equity. In other words, that the character of the foundation, or cause of action, namely, its being a decree of a court of equity, must, in every such instance, deprive the court of law of cognizance of the cause. The proposition, thus generally put, is then followed by a qualification in these words, "at least without an averment in pleading, that the decree within its territorial jurisdiction is of equal efficacy with a judgment at law." By this language the universality of the previous proposition is modified, or rather contradicted, for it contains an obvious concession, that, provided a particular efficiency can be affirmed with regard to it, an action at law may be maintained even upon a decree of a court of equity.

We will first examine the correctness of the general position, that an action at law cannot be maintained upon a decree in equity; and will, in the next place, inquire how far the jurisdiction of the court pronouncing this decree, and the efficiency of its proceedings with reference to the parties before it, may be inferred or rightfully taken notice of, from its style or character, or from proper judicial knowledge of the subject-matter of its cognizance, independently of a particular special averment.

We are aware that at one period courts of equity were said not to be courts of record, and their decrees were not allowed to rank with judgments at law, with respect to conflicting claims of creditors, or in the administration of estates; but these opinions, the fruits of jealousy in the old common lawyers, would now hardly be seriously urged, and much less seriously admitted, after a practice so long and so well settled, as that which confers on courts of equity in cases of difficulty and intricacy in the administration of estates, the power of marshalling assets, and in the exercise of that power the right of

controlling the order in which creditors, either legal or equitable, shall be ranked in the prosecution of their claims. The relative dignity of courts of equity, and the binding effect of their decrees, when given within the pale of their regular constitution and jurisdiction, are no longer subjects for doubt or question.

We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court, solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law, upon parties and their interests regularly within its cognizance. It would follow, therefore, that wherever the latter, received with regard to its dignity and conclusiveness as a record, would constitute the foundation for proceedings to enforce it, the former must be held as of equal authority. These are conclusions which reason and justice and consistency sustain, and an investigation will show them to be supported by express adjudication. * It is true that, owing to the pe- [* 77] culiar character of equity jurisprudence, there are instances of decisions by courts of equity which can be enforced only by the authority and proceedings of these courts. Such, for example, is the class of cases for specific performances; or wherever the decision of the court is to be fulfilled by some personal act of a party, and not by the mere payment of an ascertained sum of money. But this arises from the nature of the act decreed to be performed, and from the peculiar or extraordinary power of the court to enforce it, and has no relation whatsoever to the comparative dignity or authority between judgments at law and decrees in equity.

We lay it down, therefore, as the general rule, that, in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity which is for an ascertained and specific amount, and nothing more; and that the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other.

The case of *Sadler v. Robins*, 1 Campbell, 253, was an action upon a decree of the high court of chancery in the Island of Jamaica, for a sum of money; "first deducting thereout the full costs of the said defendants expended in the said suit, to be taxed by one of the masters of the said court; and also deducting thereout all and every other payment which S. and R., or either of them, might on or before the 1st day of January, 1806, show to the satisfaction of the said master, they or either of them had paid, &c." In this case, Lord Ellenborough

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said : " Had the decree been perfected, I would have given effect to it as to a judgment at law. The one may be the consideration for an *assumpsit* equally with the other. But the law implies a promise to pay a definite, not an indefinite sum."

The case of *Henly v. Soper*, 8 Barn. & Cress. 16 ; of *Dubois v. Dubois*, 6 Cowen, 496, and of *McKim v. Odom*, 3 Fairfield, 94, are all expressly to the point, that the action of debt may be maintained equally upon a decree in chancery as upon a judgment at law. But if this question had been left in doubt by other tribunals, it must be regarded as settled for itself by this court, in the explicit language of its decision in the case of *Hopkins v. Lee*, 6 Wheat. 109, where it is declared as a general rule, " that a fact which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or in any other court. Hence, a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to [* 78] all * further controversy concerning the points decided between the parties to such suit. In this there is, and ought to be no difference between a verdict and judgment in a court at law and a decree of a court of equity. They both stand upon the same footing, and may be offered in evidence under the same limitations ; and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because, without it, an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments of the same court, or to the decisions of courts of concurrent jurisdiction ; but extends to matters litigated before competent tribunals in foreign countries." The case of *Dubois v. Dubois*, 6 Cowen, was an action of debt upon a decree for a specific sum, by a surrogate of one of the counties of the State of New York. One of the objections in that case was, that the action of debt could not be maintained ; and another, that no jurisdiction was shown by the declaration. The supreme court, in its opinion, say : " The principal question raised is, whether debt will lie. The general rule is, that this form of action is proper for any debt of record, or by specialty, or for any sum certain. It has been decided that debt lies upon a decree for the payment of money made by a court of chancery in another State, and no doubt the action will lie upon such a decree in our domestic courts of equity. The decree of the surrogate, unappealed from, is conclusive, and determines forever the rights of the parties. It may be enforced by imprisonment, and is certainly evidence of a debt due ; whether the surrogate's court be a court of record need not be decided. It has often been said, that

a court of chancery is not a court of record. It is sufficient that a decree in either court, unappealed from, is final—debt will lie.” In opposition to the doctrine we have laid down, the case of *Carpenter v. Thornton*, from 3 Barn. & Ald. 52, has been cited, to show that the action of debt will not lie upon a decree of a court of equity. But with respect to the case of *Carpenter v. Thornton*, it must be remarked that Lord Tenterden, who decided that case, has, in the subsequent case of *Henly v. Soper*, 8 Barn. & Cress. 20, explicitly denied that the former case can be correctly understood as ruling any such doctrine or principle as that for which it has been here adduced. In *Henly v. Soper*, his lordship says of *Carpenter v. Thornton*: “I think it does not establish the broad principle for which it is cited. It appears by the report that I then expressed myself with much caution, and I do not find that I ever said that a decree of a court of equity fixing the balance due on a partnership account could not be enforced in a court of law * unless the items of the account could be [* 79] sued for. My judgment proceeded on the particular circumstances of that case; the bill was for the specific performance of an agreement, which is a matter entirely of equitable jurisdiction. But it is a general rule that if a partnership account be settled, and a balance struck by due authority, that balance may be recovered in an action at law.” In support of the objection that the action in this case, founded on a decree in chancery could not be maintained, the counsel for the plaintiff in error has cited the case of *Hugh v. Higgs and wife*, reported in 8 Wheat. 697. This is a short case, presenting no precise statement of the facts involved in it, and as far as the facts are disclosed by the report, they are given in a somewhat confused and ambiguous form. It is true that the objection to the action, as founded on a decree in chancery, is said by the court to have been urged in its broadest extent. But if we look to the decision of this court, and the reasoning upon which that decision is rested, we find the objection to the judgment of the circuit court, or rather the principle of that objection, narrowed and brought considerably within the extent of the objection itself. For this court say that the judgment of the circuit court must be reversed for error in the opinion, which declares that the action is maintainable on the decretal order of the court of chancery. It might very well be error to allow the action of debt upon a decretal order of the chancery, and yet perfectly regular to sustain such an action upon the final decree. The former is subject to revision and modification, the latter is conclusive upon the rights of the parties. There is yet another ground on which this case of *Hugh v. Higgs and wife*, so imperfectly stated, might form an exception to the rule which authorizes actions of debt upon de-

crees in equity. In the case last mentioned, the action at law was brought and the judgment rendered within the regular limits of the equity jurisdiction of the court, and to the full extent of which limits the court of equity had the power to enforce its decrees. Under these circumstances, it might well be ruled that a party having the right to avail himself directly of the power and process of the court, should not capriciously relinquish that right, and harass his adversary by a new and useless litigation. An exception like this is perfectly consistent with the rule, that where the decree of the court of equity cannot be enforced by its own process, and within the regular bounds of its jurisdiction, such decree, when regular and final, and when especially it ascertains and declares the simple pecuniary responsibility of a party, may, and for the purposes of justice must, be the

foundation of an action at law against that party whose [* 80] responsibility has been thus ascertained. Upon * this principle it is that the courts of law in England, whilst they have been inclined to restrict the plaintiff in the proper process of the court of equity for the purpose of enforcing the decrees of the court within the bounds of its jurisdiction, have undeviatingly maintained the right of action upon decrees pronounced by the colonial courts. The process of the colonial courts could not run into the mother country, but this fact did not impair the rights settled by the decrees of those courts or render them less binding or final as between the parties. On the contrary, it is assigned as the special reason why the courts of law should take cognizance of such causes, without which an entire failure of justice would ensue.

For this rule of decision in the English courts, the cases of *Sadler v. Robins*, and of *Henly v. Soper*, may again be recurred to; and, for its adoption by courts in our own country, may be cited *Post v. Neafie*, 3 Caines, 22, and *Dubois v. Dubois*, and *McKim v. Odom*, already mentioned.

Having disposed of the general proposition in the first assignment of causes of demurrer by the plaintiff in error, we will next inquire into the force of the condition or modification he has annexed to it, in the alleged necessity for an express averment in pleading of the efficacy or legal obligation of the decree within the territorial jurisdiction of the court by whom the decree has been pronounced.

Of the binding obligation, and conclusiveness of decrees in equity where the parties and the subject-matter of such decrees are within the regular cognizance of the court pronouncing them, and of their equality in dignity and authority with judgments at law, we have already spoken. It remains for us only to consider what may be legally intended or concluded from the pleadings in this cause as to

the territorial extent of jurisdiction in the court whose decree is made the foundation of this action.

The declaration avers: "That at a general term of the supreme court in equity for the State of New York, one of the United States of America, held at the village of Cooperstown in the State of New York, on the 1st Monday in November, in the year 1848, it was ordered, adjudged, and decreed, &c., and further, that on the 25th of November, 1848, the complainant's costs were taxed, &c., as by the said decree duly signed and enrolled at a special term of the said supreme court, &c., and now remaining in the office, &c., reference being thereto had, will appear."

It is undeniably true in pleading, that where a suit is instituted in a court of limited and special jurisdiction, it is indispensable to aver that the cause of action arose within such restricted jurisdiction; but it is equally true, with regard to *superior [*81] courts, or courts of general jurisdiction, that every presumption is in favor of their right to hold pleas, and that, if an exception to their power or jurisdiction is designed, it must be averred, and shown as matter of defence. Such is the general rule as laid down by Chitty, vol. 1, p. 442. So too in the case of *Shumway v. Stillman*, in 4 Cowen, 296. The supreme court of New York, speaking with reference to a judgment rendered in another State, says: "Every presumption is in favor of the judgment. The record is *prima facie* evidence of it, and will be held conclusive until clearly and explicitly disproved." And in further affirmation of the doctrine here laid down, we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and that with respect to these, nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively. In the case before us, the declaration avers that the decree on which the action is founded was a decree of the supreme court in equity of the State of New York—of a court whose jurisdiction in equity was supreme, not over a section of the State; but that it was the supreme court as to subjects of equity of the State, that is, of the entire State; and its decrees being ranked, in our opinion, as equal in dignity and obligation with judgments at law, its decree in the case before us was of equal efficacy with any such judgment throughout its territorial jurisdiction, or, in other words, throughout the extent of the State.

The second and third causes of demurrer assigned by the plaintiff in error, are essentially comprised in the first assignment, and are mere subdivisions of that assignment; and in disposing therefore of

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the first, the second and third causes of demurrer are in effect necessarily passed upon. We are of the opinion that the demurrer of the plaintiff in error was properly overruled, and that the judgment of the circuit court be, as it is hereby, affirmed, with costs.

EDWARD P. FOURNIQUET and Wife, and MARTIN W. EWING and
Wife, Appellants, v. JOHN PERKINS.

16 H. 82.

When a cause comes on for a hearing, on exceptions to a master's report, and for directions for a final decree, it is not irregular for the judge to reverse his decision, under which the reference was made, and dismiss the bill, if he thinks it ought to be dismissed. He is not obliged to enter a final decree which he believes erroneous.

APPEAL from the circuit court of the United States for the southern district of Mississippi. The case is stated in the opinion of the court.

Henderson, for the appellant.

Benjamin and Johnson, contra.

[* 85] *TANEY, C. J., delivered the opinion of the court.

This case came before the court some years ago, on an appeal from an interlocutory order of the circuit court, which stated that the appellants were entitled to recover certain claims set out in their bill, and directed an account to be taken by the master. It is reported 6 How. 206. The appeal was dismissed, upon the ground that an appeal would not lie from an interlocutory order, and the case was remanded to the court below, with directions to proceed to a final decree. Upon receiving this mandate, the circuit court proceeded to take the account upon the principles stated in its interlocutory order; and when the report of the master came in, exceptions were taken to it on both sides. At the argument of these exceptions, it appears that the court reconsidered the opinion it had expressed on the merits in the interlocutory order; and believing that opinion to be incorrect, dismissed the complainants' bill. The case now before us is an appeal from that decree.

The decree is undoubtedly right. For it conforms to the opinions expressed by this court in relation to the matters now in controversy in the case between Fourniquet and wife and the present appellee, reported 7 How. 160; and again in the case between these appellants and Perkins the appellee, in the case reported in 14 How. 313. It is unnecessary to state here the facts in the present case, or the matters

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in dispute, as they are fully set out in the cases referred to; and especially in the one last mentioned. For, in that case, the parties and the matters in dispute were the same with those now before the court.

The counsel for the appellants, however, objects to the decree of dismissal, because it was made at the argument upon the exceptions to the master's report, and is contrary to the opinion on the merits, expressed by the court in its interlocutory order.

* But this objection cannot be maintained. The case was [* 86] at final hearing at the argument upon the exceptions; and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the court. This court so decided when the former appeal hereinbefore mentioned, was dismissed for want of jurisdiction. And if the court below, upon further reflection or examination, changed its opinion, after passing the order, or found that it was in conflict with the decision of this court, it was its duty to correct the error. The circuit court on this occasion has properly done so, and the decree of dismissal must be affirmed, with costs.

EDWARD H. McCABE, Plaintiff in Error, v. LLOYD D. WORTHINGTON.

16 H. 86.

A decree, confirming an inchoate Spanish title, made by this court, on appeal in 1836, upon a petition originally filed in 1824, did not relate back so as to divest a title gained from the United States under an entry made in 1834. This would be inconsistent with the second section of the act of May 24, 1828 (4 Stats. at Large, 298.)

THE case is stated in the opinion of the court.

Geyer, for the plaintiff.

Wells, contra.

CATRON, J., delivered the opinion of the court.

This cause comes here by writ of error to the supreme court * of Missouri, under the twenty-fifth section of the [* 96] judiciary act. The error assumed to have been committed below, is that the court misconstrued the act of May 26, 1824,¹ enabling claimants to lands in Missouri, to institute proceedings to try the validity of their claims.

The action being an ejectment, and the defendant in possession by virtue of patents from the United States, the only question is whether the plaintiff has a better legal title.

¹ 4 Stats. at Large, 52.

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The plaintiff relies on a decree of this court, made in 1836, in favor of Soulard's heirs against the United States, 10 Pet. 100, for 10,000 arpens of land including the premises sued for. The decree is of younger date than the entries of the defendant, which were made in 1834, and are a good title to sustain or defend an ejectment in Missouri.

Soulard's claim was filed in the district court, in August, 1824, and a confirmation demanded, but which was refused, and the petition dismissed in 1825; from this decree an appeal was prosecuted, and in 1836, a decree was rendered by this court confirming the claim. And the question here is, whether the decree in the supreme court related back to the date of filing the petition against the United States in the district court. If it did, then the plaintiff is entitled to recover; and if it did not, then the judgment below must be affirmed.

The act of March 3, 1807,¹ declared that all claims to lands should be void unless notice of the claim, &c., should be filed with the recorder of land titles, prior to the first of July, 1808. Soulard's claim was not filed with the recorder, nor was it presented to any tribunal for action on it, till suit was brought in 1824, in the district court. Up to that time, the land claimed was subject to sale. This is admitted: But the argument for the plaintiff is, that the act of 1824 removed the bar, and restored the claim to its original standing as if the act of 1807 had not been passed. Admitting this to be true, still, it proves nothing, as the United States could beyond question have sold this land before 1807, and passed the legal title; and hence the removal of the bar, imposed by that act, left the land equally open to sale at any time after 1807, as it was before that time.

The act of February 17, 1818,² laid off local land districts in Missouri, one of which embraced the land in dispute, and provided for the sale of public lands, from time to time, in each district. But an exception was made according to the act of 1811:³ That till after the decision of congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land titles, and filed in his office.

[* 97] * The claims thus reserved from sale were the ones congress supposed would come before the district court and be adjudicated under the act of 1824; and as they stood protected from sale, no further provision was made by the act to protect such claims as that of Soulard, which had never been recorded.

Having given no additional protection by the act of 1824, and congress having the power to grant the land, or to cause it to be done, through the department of public lands, the commissioner of the

¹ 2 Stats. at Large, 440.² 3 Ib. 406.³ 2 Ib. 662.

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general land-office (June 25, 1831) ordered the registers and receivers of the various land districts in Missouri to proceed to sell the lands, not adjudicated under the act of 1824, which had been subject to adjudication; holding that, notwithstanding the provisions of the acts of 1811 and 1818, all claims not brought before the court, or if brought, not prosecuted to a final decision in three years by reason of neglect on the part of the claimant, were subject to be offered at public sale. Volume of Instructions and Opinions, No. 704. Under this established construction, the land in question was sold to the defendant. He could not know that Soulard's heirs claimed the land, as their claim was nowhere recorded in any office appertaining to the department of public lands; and if he had known that such claim existed, still, the land court in Missouri had ceased to exist on the 26th of May, 1830, four years before he purchased; Soulard's claim had been rejected in that court, and had been pending on appeal in the supreme court, for nearly ten years after the suit was instituted; whereas the act of 1824, required that it should be prosecuted to a final decision within three years. Thus stand the equities of the defendant. But another consideration is conclusive of this case: The act of May 24, 1828, § 2, provides, that confirmations had by virtue of the act of 1824, and patents issued thereon, should only operate as relinquishments on the part of the United States, and should in nowise affect the right or title, either in law or equity, of adverse claimants to the same land. The act spoke of confirmations by decree, and declared that the decree should operate prospectively; and consequently embraced a case, where the land was acquired by purchase from the United States before the decree was made, unless the acts of 1811 and 1818 protected the land from sale. For these reasons, we agree with the supreme court of Missouri, that the defendant has the older and better legal title, and order the judgment to be affirmed.

GEORGE W. and HENRY SIZER, Plaintiffs in Error, v. WILLIAM V. MANY.

16 H. 98.

Nothing having been done by the court below after a mandate but to tax the costs, and they being less than \$2,000, no writ of error lies.

Under the 17th section of the patent act of July 4, 1836, (5 Stats. at Large, 124,) a writ of error cannot be allowed merely to review a question of costs in a patent case.

Where a judgment is entered up, and a blank left for the amount of costs, it is proper for the court, at a subsequent term, to have the costs taxed and the blank filled *nunc pro tunc*.

THE case is stated in the opinion of the court.

George T. Curtis, for the motion.

Robb, contra.

[* 102] *TANEY, C. J., delivered the opinion of the court.

A motion has been made to dismiss the writ of error in this case for want of jurisdiction.

The case as it comes before us is this: Many, the defendant in error, in the year 1848, recovered a judgment in the circuit court for the district of Massachusetts, against the plaintiffs in error, in an action for the infringement of certain letters-patent. The verdict and judgment was for less than \$2,000, but the writ of error to remove the case to this court was allowed under the patent law of 1836. From some oversight or accident, the costs were not taxed in the circuit court before the transcript of the record was transmitted to this court. And the judgment as it stood upon the transcript was for the damages awarded by the jury, and costs of suit — leaving a blank space open for the insertion of the amount of the costs.

The judgment of the circuit court was affirmed at the December term, 1851, and the usual mandate sent down directing execution.

Upon the receipt of the mandate by the circuit court, the defendant in error applied for leave to have the costs taxed and the amount inserted in the blank left for that purpose in the original record of the judgment. The motion was refused. And thereupon the [* 103] defendant in error at December term, 1852, applied to *this court for a *mandamus* directing the court below to tax and allow his costs in the original action, amounting, as he alleged, to \$1,811.59. But the court refused the motion, upon the ground that a *mandamus* could not lawfully be issued to a circuit court to guide its judgment in the taxation of costs.

At a subsequent term of the circuit court, the defendant in error renewed his motion, for an order allowing the taxation of these costs and their insertion in the original judgment; and the court thereupon allowed the taxation of costs, and directed the amount above mentioned to be inserted in the original judgment. But the court at the same time allowed a writ of error from their decision, and ordered that this second writ of error should operate as a *supersedeas* of the execution prayed for, if sued out within the time fixed by law. It is this writ of error that is now before the court, and which the defendant in error has moved to dismiss.

It has been settled, by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the

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court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or reëxamined upon the second; and there is nothing therefore now before the court but the taxation of costs. 7 Wheat. 58; 12 Pet. 488, 492.

The sum taxed being less than \$2,000, no writ of error will lie under the act of 1789.¹ This act gives no jurisdiction to this court over the judgment of a circuit court, where the judgment is for less than that sum.

Neither can the allowance of the writ by the circuit court give jurisdiction, where the only question is the amount of costs to be taxed; and the amount allowed is less than \$2,000. The discretionary power in this respect vested in the circuit courts by the act of July 4, 1836, § 17, is evidently confined to cases which involve the construction of the patent laws, and the claims and rights of patentees under them. But the amount of costs which either party shall be entitled to recover is not regulated by these laws. The costs claimed are allowed or refused in controversies arising under the patent acts, upon the same principles and by the same laws, which govern the court in the taxation of costs in any other case that may come before it. The same laws, therefore, must be applied to them in relation to the writ of error, and must limit the jurisdiction of this court as in other cases.

The writ of error must therefore be dismissed for want of jurisdiction. But as the question raised in this case may often occur in the circuit courts; and it is important that the practice should be uniform, it is proper to say, that we consider the [* 104] decision of the circuit court, allowing those costs to be taxed after the receipt of the mandate from this court, to have been correct, and conformable to the general practice of the courts. The costs are perhaps never in fact taxed until after the judgment is rendered; and in many cases cannot be taxed until afterwards. And where this is the case, the amount ascertained is usually, under the direction of the court, entered *nunc pro tunc* as a part of the original judgment. And this mode of proceeding is necessary for the purposes of justice, in order to afford the necessary time to examine and decide upon the several items of costs, to which the successful party is lawfully entitled.

20 H. 467.

¹ 1 Stats. at Large, 73.

PIERRE CLAUDE PIQUIGNOT, Plaintiff in Error, v. THE PENNSYLVANIA RAILROAD COMPANY.

16 H. 104.

An averment that the plaintiff is an alien, and the defendants "The Pennsylvania Railroad Company," without saying whether a corporation or not, will not support the jurisdiction.

ERROR to the circuit court of the United States for the western district of Pennsylvania.

Kennedy and Alden, for the plaintiff in error.

Snowden, contra.

[* 105] * GRIER, J., delivered the opinion of the court.

The caption of this suit, and the declaration, describe the plaintiff as a citizen of France, but contain no averment as to the citizenship of the defendant. Nor does it state whether "The Pennsylvania Railroad Company" is a corporation or a private association, or the name of an individual. The declaration avers that the defendants are transporters of emigrants for hire, and undertook to convey the plaintiff and his wife from Philadelphia to Pittsburg, but did it in such a negligent and careless manner, that his wife was frozen to death on her passage. The defendant pleaded in abatement, another action pending for the same cause of action between the same parties, in the district court of Alleghany county. To this plea the plaintiff demurred; and the court gave "judgment upon the demurrer in favor of the defendants." Whereupon the plaintiff brought this writ of error.

The question raised by the plea in abatement, in this case, is one of considerable importance, and on which there is some conflict of opinion and decision, but the judgment of the court below on the plea is not subject to our revision on a writ of error.

The twenty-second section of the judiciary act, which defines what decrees or judgments in civil actions may be made the subjects of appeals or writ of error, provides, "that there shall be no reversal on such writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court."

The question of jurisdiction has not been made the subject of plea or exception, nor is it necessary, where it is patent on the face of the record. The judgment of the court, so far as the record is concerned, does not distinctly show whether the court quashed the writ on the plea in abatement, or dismissed the suit for want of jurisdiction, as it might well have done. In Pennsylvania, it is not usual to make a

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record of the judgment in legal form. The word "judgment" for the party in whose favor it is, being the usual minute made by the clerk, from which a formal record of judgment may be made, but seldom or ever is made. It stands as a symbol to represent what the judgment ought to be, and therefore can never be erroneous. But there is no necessity that the courts of the United States should follow such careless precedents.

On a demurrer, the court will look to the first error in pleading, and if the declaration does not show that the court has jurisdiction of the parties, it may dismiss the cause on that ground. In this case the declaration states the plaintiff to be a citizen of France, but gives no character as to the citizenship of the defendant. The name is most probably not intended to *designate an individual; [* 106] if not, the record does not state that it is a corporation incorporated by the laws of Pennsylvania, or having its place of business there, or that its corporators, managers, or directors are citizens of Pennsylvania, nor can the want of such averment be supplied by inference from the name. It is true, the act of congress¹ describes the jurisdiction of the court to be "where an alien is a party," without describing the character of the other party; and the pleader may have been led into the error by looking no further. But the constitution which is the superior law, defines the jurisdiction to be "between citizens of a state, and foreign states, citizens, or subjects;" and although it has been decided, (*Mason v. The Blaireau*, 2 Cranch, 264,) that the courts of the United States will entertain jurisdiction where all the parties are aliens, if none of them object to it, yet it does not appear in this case that the defendant is an alien.

It follows, therefore, that whatever construction be put on this record, the judgment of the court below must be affirmed.

19 H. 393.

WILLIAM ROBERTSON, Trustee of the Commercial Bank of Natchez,
Plaintiff in Error, v. HENRY R. COULTER, and JAMES RICHARDS,
Executors of JOSEPH COLLINS, deceased.

16 H. 106.

The question whether a person, appointed a trustee of a banking corporation, under the authority of a statute of a State, has power to sue on a note held by the bank, after he has collected enough to pay its debts, cannot be brought to this court under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85.)

¹ 1 Stats. at Large, 78.

Lawrence, in support of the motion.

Porter and Wharton, contra.

[* 112] * TANEY, C. J., delivered the opinion of the court.

This case is brought here by writ of error directed to the high court of errors and appeals of the State of Mississippi, under the 25th section of the act of 1789; upon the ground that a law of that State, under which this decision was made, impairs the obligation of contracts.

It is an action of *assumpsit*. The plaintiff declares on a promissory note made by Collins, in his lifetime, to the Commercial Bank of Natchez. The declaration avers that after the execution of the note, and before the commencement of this suit, a judgment of forfeiture was rendered against the bank on the 12th of December, 1845, according to a statute of the State, in such case made and provided; and that the plaintiff was appointed by the court trustee, and as such took possession of this note; and that by means thereof, and by force of the statute of the State, Collins became liable to pay him the money.

The defendants pleaded that the plaintiff, as trustee, had [* 113] * collected and received of the debts, effects, and property of the bank, an amount of money sufficient to pay the debts of the bank, and all costs, charges, and expenses incident to the performance of the trust. To this plea the plaintiff demurred.

The court of appeals overruled the demurrer, and gave judgment for the defendant, upon the ground that the plea was a full and complete bar to the enforcement of the right set out in the declaration. And this judgment is now brought here for revision by writ of error.

A motion has been made to dismiss the writ for want of jurisdiction. And in the argument of this motion, a question has been raised whether, by the common law, the debts due to a bank at the time of the forfeiture of its charter, would not be extinguished upon the dissolution of the corporation, and the creditors without remedy. And cases have been referred to in the Mississippi Reports, in which it has been decided that, by the common law, previous to any state legislation on the subject, upon the dissolution of a banking corporation, its real estate reverted to the grantor, and its personal property belonged to the State; that the debts due to it were extinguished, and the creditors without remedy against the assets or any of them which belonged to the bank at the time of the forfeiture.

But this question is not before us upon this writ of error, and we express no opinion upon it. The suit is not brought by a creditor of

the bank, seeking to recover a debt due to him by the corporation at the time of its dissolution. But it is brought by a trustee appointed by a court of the State, under the authority of a statute of the State; and the question before the state court, which the pleadings presented, was whether the trustee was authorized, by the law under which he was appointed, to collect more money from the debtors of the corporation than was necessary to pay its debts, and the expenses of the trust.

Now, in authorizing the appointment of a trustee, where a banking corporation was dissolved, the State had undoubtedly a right to restrict his power within such limits as it thought proper. And the trustee could exercise no power over the assets or credits of the bank beyond that which the law authorized. The court of appeals, it appears, decided that the statute did not authorize him to collect more than was sufficient to pay the debts of the corporation and the costs and charges of the trust. And, as the demurrer to the plea admitted that he had collected enough for that purpose, the court held that he could not maintain a suit against the defendants to recover more.

The question, therefore, presented to the state court was merely as to the powers of a trustee, appointed by virtue of a statute of Mississippi. His powers depended upon the construction of *the statute. And we have no right to inquire whether the [* 114] state court expounded it correctly or not. We are bound to receive their construction as the true one. And this statute, as expounded by the court, does not affect the rights of the creditors of the bank or the stockholders. The plaintiff does not claim a right to the money under a contract made by him, but under the powers and rights vested in him by the statute. And if the statute clothes him with the power to collect the debts and deal with the assets of the bank to a certain amount only, and for certain purposes, we do not see how such a limitation of his authority interferes in any degree with the obligation of contracts.

The writ of error to this court must consequently be dismissed for want of jurisdiction.

REUBEN CHAPMAN, Governor, &c., for the Use of JOHN B. LEAVITT, and RUFUS LEAVITT, Plaintiff in Error, v. ALEXANDER SMITH, BOLLING HALL, MALCOLM SMITH, and JOHN G. GRAHAM.

16 H. 114. —

Where the facts put in issue, by an assignment of a breach of a sheriff's bond, have been once tried on an issue made up according to a law of the State, they cannot be again drawn in question; and as it is a question of law, on comparison of the records, whether they were in issue, a replication which attempts to put this question to the jury, is bad.

In a proceeding against a sheriff for not making the money out of goods returned as seized, he may show, in defence, that the goods did not belong to the debtor, but to a third person.

THE case is stated in the opinion of the court.

Prior, for the plaintiffs.

Badger, contra.

[* 130] * NELSON, J., delivered the opinion of the court.

This is a writ of error to the district court of the United States for the middle district of Alabama.

The suit was brought upon an official bond given by Alexander Smith, as sheriff of Coosa county, and his sureties, conditioned that he would well and truly perform all and singular the duties of his office, as required by the laws of the State.

The declaration sets out a judgment recovered by J. W. and B. Leavitt at the fall term of 1839, in the circuit court of the second circuit of the State of Alabama, against Jeremiah M. Frion, for the sum of \$3,472; also an execution upon the same issued to the said Smith, as sheriff.

Fourteen breaches of the condition of the bond are assigned, for the purpose of charging the defendant and his sureties with the payment of the judgment.

In order to understand the purport and legal effect of these breaches, and the pleadings which follow them, it is proper to refer to two provisions in the statutes of Alabama that have a material bearing on the subject. One is, that when the sheriff shall levy an execution on property claimed by a person not a party to the execution, such person may make oath that he is the owner; and thereupon it shall be the duty of the sheriff to postpone the sale until the next term of the court; and such court shall require the parties concerned to make up an issue, under such rules as it may adopt, so as to try the right of property before a jury at the same term; and the sheriff shall make a return on the execution accordingly, provided the person claiming such property, or his attorney, shall give a bond to the sheriff, with

surety equal to the amount of the execution, conditioned to pay the plaintiff all damages which the jury, on the trial of the right of property, may assess against him, in case it should appear that such claim was made for the purpose of delay. Clay's Dig. 211, § 52.

It is further provided, that it shall be the duty of the sheriff to return the property levied on to the person out of whose possession it was taken, upon such person entering into a bond with surety to the plaintiff in the execution in double the amount of the debt and costs, conditioned for delivery of the property to the sheriff whenever the claim of property so made shall be determined by the court. Ibid.

It was subsequently provided, that one bond might be taken, with a condition embracing substantially the matters contained in the two above mentioned. Ibid. 213, § 62.

* The other provision is, that whenever the sheriff shall fail [* 131] to make the money on the execution on or before the first day of the term of the court before which the execution is returnable, the plaintiff or his attorney shall suggest to the court that the money could have been made by the sheriff, with due diligence, and it shall be the duty of the court forthwith to cause an issue to be made up to try the fact; and if it shall be found by the jury that the money could have been made with due diligence, judgment shall be rendered against the sheriff, and his sureties, or any or either of them, for the money specified in the execution, together with ten per centum on the amount. Ibid. 213, § 85.

There is, also, a similar provision in the case of the suggestion of a false return on the execution by the sheriff. Ibid. 218, § 84.

We have said there are fourteen breaches assigned of the condition of the bond in question in the declaration.

The first is, that there were divers goods and chattels, lands and tenements of Frion, the defendant in the execution within its lifetime, out of which the sheriff could have levied the amount of the judgment; but that he had neglected to levy and collect the same.

Second and third, that he had levied upon sufficient goods and chattels of the defendant, but had neglected to sell the same, and collect the amount.

The fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth, that the return made upon the execution, namely, that the goods levied on had been claimed by A. B. Dawson and Samuel Frion, assignees of J. W. Frion, defendant in the execution, and claim-bond given to W. J. Campbell, now sheriff, and my successor in office — was false, setting out in various of these breaches the grounds of the falsity in the return, namely, either that no claim had

been made to the property by Dawson and Frion, or if made, no affidavit, as required by the statute, had been furnished to the sheriff, or no bond had been required, or given; or that the proper affidavit had been made, but no bond given according to the requirement of the statute.

The thirteenth and fourteenth breaches admit an affidavit and bond, according to the statute; but charge that the claim-bond was lost by the negligence of the sheriff, and was not returned to the court with the execution at the return of the writ.

The defendants plead to the first, second, and third breaches, that at the April term of the court held in and for the county of Coosa, in 1840, the plaintiffs in the execution suggested to the court, according to the statute in such cases made and provided, after [* 132] setting out the execution, and issuing of it to the * sheriff and return of it without having levied the money thereon, that the same might have been collected, if due diligence had been used by the sheriff; that thereupon an issue was formed upon this suggestion; and that upon the trial such proceedings were had that the jury found the same in favor of the defendants. The plea further avers that the alleged neglects, defaults, and breaches of duty in the first, second, and third breaches assigned, and in said suggestion are the same, and not different.

To this plea the plaintiffs replied, that the matters, neglects, and defaults in the said three breaches assigned in the declaration, were not the same identical matters, neglects, and defaults as in said plea mentioned, and for and in respect to which the said judgment in said plea mentioned was recovered in manner and form as set forth.

To this replication there was a demurrer and joinder, and judgment for the defendants.

The defendants, also, plead to all the breaches severally, except the first, that the goods and chattels levied on as stated in said breaches at the time of the said levy, and at the time said execution came to the hands of the said Smith, sheriff, as aforesaid, were not the property of the said Jeremiah M. Frion, the defendant in the execution, and were not liable to be taken for the payment or satisfaction of the said judgment.

There was a demurrer to this plea, and joinder and judgment for the defendants.

These two pleas cover all the breaches assigned in the declaration, and if they furnished answers to them, the judgment for the defendants in the court below should be sustained.

The first three breaches, as we have seen, were first that there were goods of the defendant in the execution, and of which the

sheriff could have levied the money; but that, not regarding his duty, he neglected and refused so to do. Second and third, that he did make a levy upon the goods, but neglected and refused to sell the same.

The plea sets up that the plaintiffs made a suggestion, under the statute, to the court, at the return of the execution, that the sheriff could have collected the money thereon, if he had exercised due diligence in the execution of the writ; and upon this suggestion or allegation an issue was formed between the parties and tried by a jury, who found a verdict for the defendants, upon which a judgment was rendered.

The replication to this plea is that the matters, neglects, and defaults in the said three breaches in the declaration were not the same matters, neglects, and defaults in the said plea mentioned, and in respect to which the judgment was recovered.

* We think the replication is bad, on the ground that it raises [* 133] an issue of law, rather than one of fact. The matters in all three of the breaches were necessarily involved in the question of due and proper diligence on the part of the sheriff in the execution of the *fi. fa.* The omission to levy upon the goods, or to sell after the levy, fell directly within the issue and inquiry in that proceeding under the statute; and we are bound to presume were the subject of examination before the court and jury, and were passed upon by them. Where the facts in issue appear upon the record, either expressly or by necessary intendment, it is not competent to contradict them, as this would be contradicting the record itself. The judgment is conclusive upon these facts, between the same parties or privies, whenever properly pleaded. If the matters involved in the issue do not appear upon the record, then it is competent to ascertain them by proof *aliunde*. 2 Phillips's Ev. 15, 20, 21; C. & H. Notes, p. 13; note 14; also pp. 183, 4 and cases.

Here we cannot help seeing, that the matters sought to be put in issue by the replication are those necessarily involved in the former trial; and to uphold it, would be to permit the same facts to be agitated over again. Certainly, neglect to levy the money on the execution out of the defendant's goods within the sheriff's bailiwick, or neglect to sell them, and make the money after the levy, are facts bearing directly on the former issue; and one criterion for trying whether the matters or cause of action be the same as in the former suit, is, that the same evidence will sustain both actions. 2 Phillips's Ev. 16; C. & H. Notes, p. 19, note 17.

The issue upon the suggestion, that the sheriff could have levied the money on the execution with the exercise of due diligence, is a

very broad one. It is held, by the courts of Alabama, that the sheriff may discharge himself from responsibility by showing due diligence; and to enable him to do this, nothing more is necessary than to traverse the facts contained in the suggestion. But, if the defence consists of new matter or matters of avoidance, he must then plead it. 3 Ala. 28.

It is difficult to conceive of a broader issue for the purpose of charging this officer with neglect or default in the course of his duty under the execution.

Then, as to the plea that the goods levied on were not the goods of the defendant in the execution, and not liable to the satisfaction of the judgment. This the demurrer admits. Of course, the sheriff had no authority to make the levy, and stood responsible himself to the owner, as a trespasser, as soon as the seizure took place. In the face of this admission on the record, it is impossible to hold [* 134] him liable for the value of the goods. *The plea answers the material allegation in each of the assignments of breaches, and without which the assignment would be substantially defective, namely, the seizure of the goods on the execution. The allegations as to no claim having been made to the property by third persons, and no affidavit taken, or bond given, or if given that it was lost, are matters depending upon the levy. If that is denied or avoided, the several breaches are fully answered.

Now, the seizure of the goods of a third person, on the execution, does not change the title or make them the goods of the defendant on the execution. The only effect is, if after this the sheriff returns the execution *nulla bona*, the burden is thrown upon him in a suit for a false return to show that the goods were not the defendant's, and therefore not liable to the execution. *Magne v. Seymour*, 5 Wend. R. 309; 1 B. & C. 514.

The same principle was held in *Mason et al. v. Watts*, 7 Ala. 703. That was a case arising out of a suggestion against the sheriff and his sureties, under the statute to which we have referred, and in a case where the goods had been seized, and a return upon the execution accordingly. The suggestion was met that the goods were not the property of the defendant in the execution.

The court say, that the sheriff may excuse himself by showing that the defendant in the execution had no property in the goods levied upon. That the reason for this is, that the sheriff, by levying upon the goods of a third person, becomes a trespasser, and being so, the law does not impose on him the duty of holding the goods after he has ascertained their true ownership. Another observation in that case is applicable here. The court says it may be, if a loss results to

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the plaintiff by being cast in costs, or otherwise, from the neglect of the sheriff to retain the affidavit of claim, or bond executed by the claimant, he may be liable in an action on the case, but not for the value of the property levied on. Although the suit on the bond in this case, according to the practice in the courts of Alabama, may be regarded as a substitute for this action, still, no such ground or cause of action is set out in any of the assignments of breaches, and of course no opportunity given to answer it. We are satisfied, therefore, that the plea is a full answer to all the breaches assigned to which it refers, and has been pleaded.

There are many other pleas, replications, and issues of law raised upon them, arising out of the useless number of breaches assigned in the declaration, and which have very much tangled and complicated the pleadings in the record; but we do not propose to examine or express any opinion upon them, as, upon the whole record we see a complete defence to all the *causes of action set [* 135] forth in the declaration, it would be an idle and profitless waste of time to enter upon their examination, and, besides, whatever might be our conclusions, they would not vary the result. Stephen's Pl. 153, 176.

The judgment of the court below is affirmed.

This cause came on to be heard on the transcript of the record, from the district court of the United States for the middle district of Alabama, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

In the Matter of JOSIAH S. STAFFORD and JEANNETTE KIRKLAND,
his Wife, Appellants, v. THE UNION BANK OF LOUISIANA.

16 H. 135.

An appeal does not supersede the execution of a decree of foreclosure by sale of mortgaged slaves, unless a bond to secure the whole amount of the debt is given within ten days after the date of the decree, though the property is in the hands of a receiver.

THE case is stated in the opinion of the court.

Hale and Coxe, for the motion.

M'LEAN, J., delivered the opinion of the court. [* 139]

• This is an appeal from the district court of Texas, and a motion is made to dismiss it, on the ground that security has been given in the sum of ten thousand dollars only, when the sum decreed

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to be paid was sixty-five thousand dollars. And a *procedendo* is prayed, commanding the district court to execute the decree.

Notice of this motion was acknowledged by the counsel for the appellant the 11th of March, 1854.

As the appeal was taken since the commencement of the present term, the appellant is not bound to file the record until the next term.

By the decree in the district court, a mortgage on a large number of slaves, to secure the payment of a debt due to the Union Bank of Louisiana, was foreclosed. A receiver having been previously appointed, who hired out the slaves and received the hire, he was directed by the decree to pay to the bank the sum of twenty-five thousand three hundred and twenty-nine dollars and thirty-nine cents, moneys in his hands, and that the residue of the money due, amounting to the sum of thirty-nine thousand eight hundred and seventy-seven dollars and thirteen cents, should be paid on the first day of July next, and if not so paid, that the slaves should be seized and sold.

On the 7th of March, 1854, the tenth day after the decree was entered, the defendants prayed an appeal, which was granted, and on the same day a bond was given in the penal sum of ten thousand dollars, as required by the court.

As the appeal has not been regularly entered on the docket, and as the appellant is not bound to enter it until next term, a motion to dismiss it cannot be entertained. But as the record is before us, which states the facts on which the motion is founded, the court will suggest their views of the law, in regard to an important point of practice.

The act of 1803,¹ places appeals in chancery on the same footing as writs of error. And in the case of *Catlett v. Brodie*, 9 Wheat. 553, this court held that security must be given on a writ of error, to operate as a *supersedeas* for the amount of the judgment. By the act of 12th December, 1794,² when a stay of execution is not desired, security shall be given only to answer costs.

A motion was made, in the district court, to dismiss the allowance of the appeal, on the ground that security in the amount of the decree had not been given. This was opposed by the counsel of the appellant, and it was alleged, as the receiver had given two bonds,

each in the penalty of twenty thousand dollars, for the faithful discharge of his duties, and as the * mortgaged slaves

were in possession of persons who had hired them, who had given bonds in the joint penalty of eighty thousand dollars, for the safe-keeping and delivery of the slaves, that no further security, ♣

¹ 2 Stats. at Large, 244.

² 1 Ib. 404.

under the statute, ought to be required to entitle the appellant to a *supersedeas* against the decree. The court overruled the motion.

The decision of this court, in the case above cited, was, that the words of the act, "sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good," do not refer to "the nature of the claim upon which the original judgment is founded, but that they are descriptive of the indemnity which the defendant is entitled to, if the judgment be affirmed." And the court further say: "Whatever losses he, the defendant in error, may sustain by the judgment not being satisfied and paid after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security."

If this construction of the statute be adhered to, the amount of the bond given on the appeal must be the amount of the judgment or decree. There is no discretion to be exercised by the judge taking the bond, where the appeal or writ of error is to operate as a *supersedeas*. This rule was established in 1817, and it has been adhered to ever since.

The hardship of this rule, on the appellant, is more imaginary than real. Suppose the appellant had given ample personal security on the original obligation for the payment of the money, and the sureties were sued with the principal, would they be excused from giving bail on an appeal or writ of error, as the act requires? And how does such a case differ from the one before us, where mortgage has been given on personal property.

If the receiver has given security, in forty thousand dollars, faithfully to pay over the money in his hands; and if those persons who employed the slaves have given bond in eighty thousand dollars, for the safe-keeping and delivery of them, and the sureties are good, the appellant can have no difficulty in giving the security on his appeal, to the amount of the decree in the district court. It is true the property is taken out of his possession and control, but it is in possession of persons who gave bonds for its safe-keeping and delivery when required, a part of it in payment of the decree, and the residue to be sold in satisfaction of the balance of the decree. In this condition of the property, if the transaction be *bonâ fide*, (and it may be presumed to be fair, as the arrangement was made under the order of the court,) the responsibility on the appeal bond, can be little * more than nominal. The state of the property affords [* 141] more safety to the security on the appeal bond than if the property and money were in possession of the appellants, and under

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their control. A double mortgage is on the property, that it shall be faithfully applied to the payment of the decree.

The appeal is for the benefit of the appellant. A decree in the district court has been entered against him, and there is, in the custody of the law, a sufficient amount of money and property to pay the amount decreed. An appeal suspends the payment some one or two years, and as this is done for the benefit of the appellants and at their instance, is it not equitable that the risk should be provided for by them? The law has so decided, by requiring security to be given to the amount of the decree, without reference to the nature of the suit. The provision of the act, as construed by this court, is not a matter over which the court can exercise a discretion. The language is mandatory, and must be complied with. We can know nothing of the responsibility of the receiver or of the hirers of the slaves, nor is it proper that we should inquire into their circumstances and the responsibility of the sureties, with the view of substituting them for the security on the appeal, which the law requires.

For the reasons stated, the court cannot dismiss the appeal, nor award a *procedendo*. A more appropriate remedy would seem to be a rule on the district judge, to show cause why a *mandamus* should not be issued; but this can be done only on motion.

CATRON, J. The case was decided in the district court, in March last, and during the present term of this court, and an appeal taken to our next term; consequently, the cause is not here, nor have we any power to dismiss it. The motion to dismiss must therefore be overruled. But I do not agree to the opinion expressed by a majority of my brother judges, advising the appellees what course to pursue against the district judge: First, because we have no case before us authorizing such an expression of opinion; and I am opposed to a mere dictum attempting to settle so grave a matter of practice. And secondly, my opinion is that the statute referred to does not govern a case in equity, where property is pursued under a mortgage, and the mortgaged property, at the complainant's instance, has been taken into the hands of the court, and so remains at the time of the appeal.

If the property, from its perishable nature, had been by interlocutory decree converted into money, and this was in court, [*142] * then I think, no security to cover its contingent loss should be required; and here twenty-five thousand dollars has been earned, previous to the suit, by the mortgaged slaves, and is in court.

That this mortgagor is stripped of his property, and cannot give

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security for so large an amount, is manifest, and to construe the act of congress as if this was a simple judgment at law, would operate most harshly.

Motion overruled.

17 H. 275; 3 Wal. 688.

CHARLES DAVENPORT *et al.*, Heirs of JOHN DAVENPORT, deceased, v.
F. FLETCHER *et al.*

16 H. 142.

A writ of error was dismissed, 1. Because it did not name all the parties to the judgment. 2. Because the bond was given to a person not a party to the record. 3. Because the citation was issued to a person who was not a party to the record.

ERROR to the circuit court for the eastern district of Louisiana.

Perrin, for the motion.

Duncan and Coxe, contra.

M'LEAN, J., delivered the opinion of the court.

[* 144]

A motion has been made for a dismissal of this cause.

1. Because the judgment is not properly described in the writ of error.

2. Because the bond is given to a person who is not a party to the judgment.

3. Because the citation issued, is issued to a person who is not a party.

The objections are all founded in fact, and upon the authority of *Samuel Smyth v. Strader, Perine and Co.* 12 How. 327. The case is dismissed, with leave, however, to the counsel for the plaintiffs, to move for its reinstatement, during the present term.

6 Wal. 244.

JAMES ADAMS, Executor of THOMAS LAW, deceased, and HENRY MAY, Administrator of EDMUND and THOMAS LAW, Appellants, v. JOSEPH E. LAW, by his next Friend, MARY ROBINSON.

16 H. 144.

A *supersedeas* of a decree in chancery can only be had by giving a bond, pursuant to the 23d section of the judiciary act of 1789, (1 Stats. at Large, 85.)

APPEAL from the circuit court for the district of Columbia.

Coxe and Carlyle, for the motion to dismiss the appeal, and issue a *procedendo*.

Lawrence, Bradley, and May, for a writ of *supersedeas*.

[* 146] * M'LEAN, J., delivered the opinion of the court.

This is an appeal in chancery, from the decree of the circuit court for the District of Columbia.

[* 147] * A motion is made by the appellant's counsel for a *supersedeas*, on the ground that the hearing of the case in the circuit court was brought on irregularly, and the decree entered in the absence of the principal counsel for the defendants below; that by reason of this an appeal bond was not filed within ten days from the allowance of the appeal.

Mr. May, who makes this motion, states that he is the administrator of the estate of Thomas and Edmund Law, children of John Law, who in their lifetime were parties to the suit; and that he intended to appeal from the decree of the circuit court, if against him; that he had no notice of the cause being set for hearing; that he left the United States on public business, and was absent several months; that on his return he learned that a final decree had been entered against him, and that he had authorized no one to consent to the hearing of the cause out of its regular course.

It appears that two other counsel who appeared for other defendants, consented to the hearing in order that the cause might be taken to the supreme court, for ultimate decision; and these counsel understood the cause was to be appealed to the supreme court by consent, and that security for the money decreed to be paid would not be required. But both of these gentlemen state that, in giving their assent to the hearing, they did not represent Mr. May, not being authorized to do so.

The suit in the circuit court was entitled: "Joseph E. Law by his next friend, Mary Robinson v. Thomas Law and others, and James Adams, executor of Thomas Law." The controversy arose under the will of Thomas Law, deceased, and among other things the court decreed that James Adams, the trustee in the cause, who had sold certain property under the order of the court and had the proceeds in his hands, exceeding the sum of sixty-one thousand dollars, should pay over the money to the persons named in the decree, as entitled to the same. This decree was entered the 18th day of December, 1852; and an appeal to the supreme court of the United States was prayed on the same day. An appeal bond, in the sum of two hundred dollars, was filed the 9th of December, 1853.

The twenty-third section of the act of 1789, provides, "that a writ of error shall be a *supersedeas*, and stay execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days; Sundays exclusive, after rendering the judgment or passing the decree complained of, until the expiration of which term of ten days the execution shall not issue in any case where a writ of error may be a *supersedeas*. By the second section of the act of March 3, 1803,¹ appeals are *declared to be "subject to the [*148] same rules, regulations, and restrictions as are prescribed in law in case of writs of error."

Under this provision an appeal in chancery must be perfected, by giving an appeal bond within the ten days, to act as a *supersedeas*. In *Wallen v. Williams*, 7 Cranch, 278, the court refused to quash an execution issued by the court below to enforce its decree, pending a writ of error, as the writ was not a *supersedeas* to the decree. In *The Dos Hermanos*, 10 Wheat. 311, where the appeal was prayed within the five years limitation, the appeal bond being accepted by the court after that period, was held good, as having relation to the time of the appeal. "The mode of taking security and the time of perfecting it," the court say, "are matters of discretion, to be regulated by the court." But this cannot apply to a case, where the appeal operates as a *supersedeas*. It must be brought strictly within the provisions of the law.

The appeal, in this case, was prayed on the same day the decree was entered; but the bond was not given until nearly a year afterwards. The appeal must be perfected within the ten days after the decree was entered, to operate as a *supersedeas*. To supersede a judgment at law, the writ of error must be filed and bond given within the ten days. And the same rule is applied by the act of 1803, to appeals in chancery.

The case of *Hardeman and Perkins v. Anderson*, 4 How. 642, is relied on as an authority under which a *supersedeas* may be issued in this case. In that case, it appeared from the record that the writ of error was issued and bond given within ten days after the judgment, and that the clerk of the district court promised to transmit the record to the supreme court. It was transmitted, but by some delay was not received until a few days after the adjournment of the court, at the ensuing term. Before the adjournment, a certificate of the judgment having been obtained by the plaintiff's counsel, in the judgment, on motion the cause was, under the rule of the court, docketed and dismissed. At the next term, on motion sustained by

¹ 1 Stat. at Large, 244.

an affidavit, showing that the defendant in the judgment had not been negligent in the cause, it was ordered to be docketed, and a writ of *supersedeas* was issued, not on the second writ of error which had been issued, but to give effect to the first writ. After the dismissal of the cause at the previous term, execution was issued on the judgment, and it was necessary, after the cause was entered upon the docket, to supersede that execution.

It does not appear from the facts in the case now before us, that it can be brought within any decision of this court. Whatever may have been the understanding of the counsel who appeared [* 149] in the defence, in the circuit court, as to an appeal of the case to the supreme court, by consent and without security, it is not made to appear that the counsel of the complainants assented to such an arrangement.

By the order of the circuit court, a copy of the decree was served on James Adams, the trustee; and also a rule to show cause why an attachment should not issue against him for not paying over to the parties the sums of money as required by the decree. His answer to the rule was filed, and a motion being made for an attachment, it was taken under consideration, and has not yet been decided.

This court cannot presume that the circuit court, in the exercise of their discretion, will take any step in regard to the decree, which shall place the fund at hazard or beyond the exercise of the appellate powers of this court.

The motion for a *supersedeas*, by the counsel for the plaintiffs in error, is overruled.

The court also overrule, under the circumstances, the motion of the defendant's counsel in error, for a *procedendo*.

A motion is also made, by defendant's counsel, to dismiss the appeal on the ground, "that there is no case, as entitled on the record; and that the real parties interested in the case, of which a record is filed, are not made parties to the appeal."

After the decree was pronounced in the circuit court, the record states: "From which decree an appeal was prayed to the supreme court of the United States, on the 18th December, 1852, and to them it was granted." The word "defendants" is omitted in this prayer, but that must have been a clerical omission, as it appears the appeal was "granted to them," that is, to the defendants.

The title of the case, if incorrectly entered on the docket of this court, may and should be corrected by the record filed. There is nothing in the record to show that the appeal by the defendants was not prayed by all of them. The motion to dismiss is therefore overruled.

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JOHN STUART, JOSEPH STUART, JAMES STUART, and WILLIAM H. SCOTT, Plaintiffs in Error, v. HUGH MAXWELL.

16 H. 150.

The 20th section of the tariff act of 1842, (5 Stats. at Large 565,) was not designed to levy duties, but to check fraudulent evasions, or prevent doubts in the execution of the revenue laws; and it is not repealed by the tariff act of 1846, (9 Stats. at Large 42.)

THE case is stated in the opinion of the court.

J. S. McCulloch, for the plaintiffs.

Cushing, (attorney-general,) *contra*.

* CURTIS, J., delivered the opinion of the court. [* 158]

The plaintiffs in error brought their action in the circuit court of the United States for the southern district of New York, against the defendant, who was formerly collector of the customs for the port of New York, to recover moneys alleged to have been illegally exacted as duties. The plaintiffs entered at the custom-house certain goods as "manufactures of linen and cotton," and claimed to have them admitted on payment of the duty of twenty per cent. levied on unenumerated articles under the 3d section of the tariff act of 1846. The defendant insisted that the 20th section of the tariff act of 1842, was in force, and that by force of it these goods, being manufactured * partly of cotton, must be assessed twenty- [* 159] five per cent., that being the duty imposed by the act of 1846 upon manufactures of cotton not otherwise provided for. If these articles are, for the purpose of fixing the amount of duty, deemed by law to be manufactures of cotton, it is not denied that the duty was rightly assessed. And whether they are to be so reckoned and treated, depends upon the question whether the 20th section of the act of 1842, was repealed by the tariff act of 1846.

That 20th section is as follows: "That there shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-

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enumerated article the same rate of duty as is chargeable on the article it resembles paying the highest rate of duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

This section is a reënactment of the 2d section of the tariff act of 1841. 5 Stats. at Large, 464.

The repealing clause in the act of 1846 is, "that all acts and parts of acts repugnant to the provisions of this act be and the same are hereby repealed." It is alleged by the plaintiffs that repugnance exists between the 20th section of the act of 1842 and the act of 1846. The argument is, that the act of 1846 divides all imports into three classes; first, those specified which are to be free of duty; second, those specified which are required to pay different but specific rates of duty; third, those not specially provided for in the act, which are required to pay a duty of twenty per cent. *ad valorem*; that a manufacture of cotton and flax not being included, *nominatim*, among the imports which are to be exempted from or subject to duty, is necessarily embraced within the class of non-enumerated articles, and so are liable to a duty of twenty per cent. only; and that this argument is strengthened by the fact that, in schedule D, manufactures composed wholly of cotton, are taxed twenty-five per cent.; and that if it had been intended to tax manufactures composed partly of cotton and partly of flax, with a duty of twenty-five per cent., they would have been specifically mentioned in this schedule; [* 160] and that it is not admissible, under an act which, in terms, levies a tax of only twenty per cent. upon all imports not specially provided for, to levy a tax of twenty-five per cent. upon an import not named or described in the act as liable to that rate of duty.

The force of this argument is admitted. It is drawn from sound principles of interpretation. But on a careful consideration of this case, we are of opinion that it ought not to prevail in the construction of this law.

The act of 1846 is a revenue law of the United States, and must be construed with reference to acts *in pari materia*, of which it forms only one part. This observance of a settled principle for the construction of statutes is absolutely necessary in the present state of the legislation of congress on the subject of revenue. Without it, the public revenue could not be collected, and inextricable embarrassments and difficulties must constantly occur. We are obliged to look at the whole existing system, and consider the nature of the subject-matter of the enactment under consideration, in its relations

to that system, in order to pronounce with safety upon its repugnancy to or consistency with any particular act of congress.

In the first place, then, it must be observed that the 20th section of the act of 1842 does not impose any particular rate of duty upon imports. It was designed to afford rules to guide those employed in the collection of the revenue, in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. Manufacturing ingenuity and skill have become very great; and diversities may be expected to be made in fabrics adapted to the same uses, and designed to take the same places as those specifically described by some distinctive marks, for the mere purpose of escaping from the duty imposed thereon. And it would probably be impossible for congress, by legislation, to keep pace with the results of these efforts of interested ingenuity. To obviate, in part at least, the necessity of attempting to do so, this section was enacted.

It does not seem to be any more repugnant to the provisions of the act of 1846 than the great number and variety of provisions of the revenue laws, whose object was to cause the revenue to be regularly and uniformly collected without evasion or escape. If this act of 1846 had in terms enacted the 20th section of the act of 1842, its provisions would not thereby have been rendered repugnant or conflicting. This section would then only have afforded a rule by which it could be determined that certain articles did substantially belong to, and were to be reckoned as coming under a particular schedule.

This is apparent, not only from a consideration of the subject-matter of the *20th section, when compared with [* 161] the act of 1846, but from the fact that this 20th section actually made part of an act whose subject-matter, and the outline of whose provisions, were the same as those of the act of 1846. The act of 1842 levied duties on certain imports specifically named. It declared certain other articles, also specifically named, to be exempt from duty, and it provided that a duty of twenty per cent. *ad valorem* should be levied on all articles not therein provided for. Yet this 20th section made a consistent part of that act. The 26th section of the act of 1842 provides: "That the laws existing on 1st day of June, 1842, shall extend to and be in force for the collection of the duties imposed by this act on goods, wares, and merchandise imported into the United States, and for the recovery, collection, distribution, and remission of all fines, penalties, and forfeitures, and for the allowance of the drawbacks by this act authorized, as fully and effectually as if every regulation, restriction, penalty, forfeiture, pro-

vision, clause, matter, and thing in the said laws contained had been inserted in and reënacted by this act."

The act of 1846 contains no corresponding provision. So that, unless we construe the act of 1846 substantially as an amendment of the act of 1842, merely altering its provisions so far as the latter enactment is inconsistent with the former, the entire instrumentalities for the collection of the revenue under the act of 1846 would be wanting, and the duties which it requires to be paid could not be collected. It is quite apparent, therefore, that a great number and variety of provisions designed to protect the revenue against mistakes, evasions, and frauds, and to guard against doubts and questions, and to secure uniformity of rates in its collection, owe their present operation upon the duties levied by the law of 1846, to the vitality given to them by the law of 1842, and must be considered now to be the law, because the act of 1842 made them in effect a part of its enactments, and because the act of 1846 does not interfere with that enactment by which they were made so. And it must be further observed that these provisions of the 20th section of the act of 1842 are of the same nature as those thus left in force under the 26th section of the act of 1842, having been designed to remove doubts, to promote uniformity, and to check evasions and frauds.

There is nothing, therefore, in the general scope of the act of 1846 repugnant to the rules prescribed in this 20th section of the act of 1842. Is there in its particular phraseology?

It is strongly urged that there is; that the terms of the 3d section are wholly inconsistent with the attempt to bring any article [* 162] under either of the schedules, by operation of any law *outside of the act of 1846. That this 3d section enacts, in clear terms, that a duty of twenty per cent. *ad valorem* shall be levied on all goods "not specially provided for in this act;" and that to levy a higher rate of duty, by force of a provision of some other act, is directly in conflict with the express words of the law. It must be admitted, there is great force in this argument. It has received due consideration; and the result is that, in our opinion, it is not decisive. In the first place, it may be justly said, that if the act of 1846 has specially provided for manufactures of cotton, and has at the same time left in force a rule of law which enacts that all manufactures of which cotton is a component part shall be deemed to be manufactures of cotton, if not otherwise provided for, it has in effect provided for the latter. By providing for the principal thing, it has provided for all other things which the law declares to be the same. It is only upon this ground that sheer and manifest evasions can be reached. Suppose an article is designedly made to serve the uses and take the

place of some article described, but some trifling and colorable change is made in the fabric or some of its incidents. It is new in the market. No man can say he has ever seen it before, or known it under any commercial name. But it is substantially like a known article which is provided for. The law of 1842 then declares that it is to be deemed the same, and to be charged accordingly; that the act of 1846 has provided for it under the name of what it resembles. Besides, if the words "provided for in this act" were to have the restricted interpretation contended for, a like interpretation must be given to the same words in other revenue laws, and the most prejudicial consequences would follow; such consequences as clearly show it was not the intention of congress to have these words so interpreted.

Thus the 26th section of the act of 1842, already cited, adopts existing laws for the collection of duties "imposed by this act," for the collection of penalties and remission of forfeiture, and the allowance of drawbacks "by this act authorized." Yet, as has already been said, it is by force of this adoption that the duties and penalties under the act of 1846 are collected. It is manifest that the structure of the revenue system of the United States is not such as to admit of this exact and rigid interpretation; that the real intention of the legislature cannot thus be reached. The true interpretation we consider to be this: the 26th section of the act of 1842 having reënacted the then existing laws, and applied them to the collection of duties levied by that act, when congress, by the act of 1846, merely changed the rates of duty, without legislating concerning their collection, the laws in force on that subject are to be applied; *and [* 163] this application is not restrained by the fact that, when reënacted by the act of 1842, they were declared to be so for the purpose of collecting the duties by that act imposed. The new duties merely take the place of the old, and are to be acted on by existing laws as the former duties were acted on; and among these existing laws is that which affords a rule of denomination, so to speak; which determines under what designation in certain cases a manufacture shall come, and how it shall be ranked; when this has been determined, the act of 1846 levies the duty.

It is urged, that in the act of 1846, special provision is made for certain manufactures composed partly of cotton, and that this shows no general rule was in operation imposing a particular rate of duty on articles made partly of cotton. But that this would not be a safe inference is evident from the fact that the act of 1842 imposes the same rate of duty on manufactures of wool and on manufactures of which wool is a component part, worsted, and worsted and silk,

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cotton, or of which cotton shall be a component part; yet this act of 1842 contained the section now under consideration. It may be observed, also, that schedule D, in the act of 1846, after manufactures composed wholly of cotton, goes on to specify cotton laces, cotton insertings, trimming laces, and braids, &c.

It would not be safe for the court to draw any inference from the apparent tautology of those parts of a revenue law describing the subjects of duty. In most cases, the terms used being addressed to merchants, are to be understood in their mercantile sense, the ascertainment of which is matter of fact, depending on evidence; and that which may seem merely tautologous might turn out to be truly descriptive of different subjects.

On the whole, our opinion is, that there is no necessary repugnance between the act of 1846 and the 20th section of the act of 1842, and consequently the former did not repeal the latter, and the duty in question was rightly assessed. The judgment of the circuit court is, therefore, affirmed.

Grier, J., dissented.

17 H. 85.

ALEXANDER CROSS, WILLIAM L. HOBSON, and WILLIAM HOOPER, trading under the Name and Style of CROSS, HOBSON, AND COMPANY, Plaintiffs in Error, v. EDWARD H. HARRISON.

16 H. 164.

Duties collected in California between February 3, 1848, (the date of the treaty of peace,) and November 13, 1849, (when the collector entered on the duties of his office,) were not illegally exacted, and cannot be recovered back by the importer.

Richard T. Merrick, James W. McCulloch, (with whom were John S. McCulloch, Rockwell, and Lawrence,) for the plaintiffs.

Cushing, (attorney-general,) contra.

[* 181] WAYNE, J., delivered the opinion of the court.

This case comes up, by writ of error, from the circuit court of the United States for the southern district of New York.

It was an action brought by Cross, Hobson, and Company, against Harrison, for the return of duties alleged to be illegally exacted by Harrison whilst he was acting as collector of the customs at the port of San Francisco, in California. The claim covered various amounts of money which were paid at intervals between the 3d day of February, 1848, and the 13th of November, 1849. The first of these dates was that of the treaty of peace between the United States and Mexico, and the latter when Mr. Collier, a person who had been reg-

ularly appointed collector at that port, entered upon the performance of the duties of his office. During the whole of this period it was alleged by the plaintiffs, that there existed no legal authority to receive or collect any duty whatever accruing upon goods imported from foreign countries.

The period of time above mentioned was subdivided by the plaintiffs in the prayers which they made to the court below, into two portions, to each of which they supposed that different rules of law attached. The three periods may be stated as follows:—

*3d of February, 1848, the date of the treaty of peace [*182] between the United States and Mexico. 9 Stats. at Large, 922 to 943.

3d of March, 1849, when the act of congress¹ was passed, including San Francisco within one of the collection districts of the United States. And

13th of November, 1849, when Collector Collier entered upon the duties of his office.

In order to show what was the state of things on the 3d of February, 1848, it is necessary to refer to some of the public documents which were offered in evidence by the plaintiffs, being Senate Document No. 18 of the 1st session of the 31st congress.

On the 19th of August, 1847, H. W. Halleck, signing himself "Lieutenant of engineers and secretary of state for the territory of California," issued a circular to certain persons who had been appointed collectors of the customs, in which he recited that the commander-in-chief of the naval forces had been authorized by the President of the United States to establish port regulations, to prescribe the conditions under which American and foreign vessels might be admitted into the ports of California, and also to regulate the import duties. The circular then prescribed certain rules which were to be observed.

On the 15th of September, 1847, Commodore Shubrick prescribed certain rates, or scales of duties, which were confirmed on the 14th of the ensuing October, by R. B. Mason, who signed himself colonel of the 1st dragoons and governor of California.

On the 20th of October, 1847, Colonel Mason, still styling himself governor of California, issued an order saying, that "recent instructions from the President of the United States made the officers of the army and navy the collectors of the customs in California." The arrangement was made accordingly.

This was the state of things up to the 3d of February, 1848, the

¹ 9 Stats. at Large, 400.

first epoch mentioned by the plaintiffs in their prayers to the court. The war tariff was collected by officers of the army and navy.

On the 3d of February, 1848, a treaty of peace was signed between the United States and Mexico, the ratifications of which were exchanged on the 30th of May ensuing. Some alterations were made in the mode of collecting the revenue during this second period of time, namely, between the 3d of February, 1848, and 3d of March, 1849, which it is necessary to notice.

On the 26th of July, 1848, Colonel Mason, still calling himself governor of California, issued a number of regulations for [*183] *the government of the custom-house, amongst which the following two may be mentioned: —

“7. If any master of a vessel shall be detected in landing, or attempting to land, anywhere in California, any goods or merchandise, without permit from a collector, he shall be fined for every such offence in the sum of five hundred dollars, and the goods or merchandise so landed, or attempted to be landed, and the boat or boats, through which such landing is effected or attempted, shall be seized, forfeited, and sold by the nearest collector.

“8. If any person or persons other than the master of a vessel shall be detected in landing, or attempting to land, anywhere in California, any goods or merchandise, without permit from a collector, he or they shall be fined in the sum of one hundred dollars, and the goods or merchandise so landed, or attempted to be landed, and the boat or boats, through which such landing is effected or attempted, shall be seized, forfeited, and sold by the nearest collector.”

On the 7th of August, 1848, a proclamation was issued to the people of California, by R. B. Mason, the governor, announcing the ratification of the treaty of peace, by which upper California was ceded to the United States.

On the 9th of August, H. W. Halleck, lieutenant of engineers and secretary of state, wrote to Captain Folsom, the collector of the customs at San Francisco, directing him to perform the duties until further orders, but announcing that he would be relieved as soon as some suitable citizen could be found to be appointed his successor. In the mean time he was told “the tariff of duties for the collection of military contributions will immediately cease, and the revenue laws and tariff of the United States will be substituted in its place.”

In order to illustrate the view which Colonel Mason took of his position, it may be proper to insert the following extract from a letter written by him to the war department on the 14th of August, 1848.

“In like manner, if all customs were withdrawn, and the ports thrown open free to the world, San Francisco would be made the

depot of all the foreign goods in the north Pacific, to the injury of our revenue and the interests of our own merchants. To prevent this great influx of foreign goods into the country duty free, I feel it my duty to attempt the collection of duties according to the United States tariff of 1846.¹ This will render it necessary for me to appoint temporary collectors, &c., in the several ports of entry, for the military force is too much reduced to attend to those duties.

"I am fully aware that, in taking these steps, I have no further *authority than that the existing government must [*184] necessarily continue until some other is organized to take its place, for I have been left without any definite instructions in reference to the existing state of affairs. But the calamities and disorders which would surely follow the absolute withdrawal of even a show of authority, impose on me, in my opinion, the imperative duty to pursue the course I have indicated, until the arrival of dispatches from Washington, (which I hope are already on their way,) relative to the organization of a regular civil government. In the mean time, however, should the people refuse to obey the existing authorities, or the merchants refuse to pay any duties, my force is inadequate to compel obedience."

On the 3d of September, 1848, Governor Mason appointed Edward H. Harrison temporary collector of the port of San Francisco, with a salary of \$2,000 per annum, provided that so much was collected over and above the expenses of the custom-house.

In order further to illustrate the view which was taken by the executive branch of the government, of the existing condition of things in California, it is proper to insert an extract from a dispatch written by Mr. Buchanan, secretary of state, to Mr. Voorhees, on the 7th of October, 1848. It is as follows:—

"The President, in his annual message, at the commencement of the next session, will recommend all these great measures to congress in the strongest terms, and will use every effort, consistent with his duty, to insure their accomplishment.

"In the mean time, the condition of the people of California is anomalous, and will require, on their part, the exercise of great prudence and discretion. By the conclusion of the treaty of peace, the military government which was established over them under the laws of war, as recognized by the practice of all civilized nations, has ceased to derive its authority from this source of power. But is there, for this reason, no government in California? Are life, liberty, and property, under the protection of no existing authorities? This would be a singular phenomenon in the face of the world, and especially

¹ 9 Stats. at Large, 42.

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among American citizens, distinguished as they are, above all other people, for their law-abiding character. Fortunately, they are not reduced to this sad condition. The termination of the war left an existing government, a government *de facto*, in full operation, and this will continue, with the presumed consent of the people, until congress shall provide for them a territorial government. The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate *an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.

“This government *de facto* will, of course, exercise no power inconsistent with the provisions of the constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles the growth, produce, or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California. Nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California is within the territory of the United States. I shall not enlarge upon this subject, however, as the secretary of the treasury will perform that duty.”

At the same time, dispatches were issued by the war and treasury departments to their respective officers, of similar import to the above. Mr. Walker, the secretary of the treasury, after providing for the reciprocal admission of goods which were the growth, &c., of California and the United States, free of duty, into the ports of each, thus provided for the case under consideration, so as to protect the revenue. “Third. Although the constitution of the United States extends to California, and congress have recognized it by law as a part of the Union, and legislated for it as such, yet it is not brought by law within the limits of any collection district, nor has congress authorized the appointment of any officers to collect the revenue accruing on the import of foreign dutiable goods into that territory. Under these circumstances, although this department may be unable to collect the duties accruing on importations from foreign countries into California, yet if foreign dutiable goods should be introduced there, and shipped thence to any port or place of the United States, they will be subject to duty, as also to all the penalties prescribed by law when such importation is attempted without the payment of duties.

R. J. WALKER,
Secretary of the Treasury.”

When these papers reached California, some doubt was entertained whether or not the revenue laws would be enforced, and application was made to Commodore Jones, then commanding the naval forces in the Pacific, to know whether he would use the forces under his command to aid the collector in seizing and confiscating goods, &c. ; to which the commodore replied that he would so employ the force under his command.

On the 23d of February, 1849, Cross, Hobson, and Company protested against the payment of \$105.62, duties which [* 186] accrued upon an importation by the French bark Staonele, and also protested against the payment of duties upon all other importations, past, present, or to come.

In order still further to explain the views of those who administered the government in California, it may be proper to introduce another extract from instructions which were issued on the 2d of February, 1849, by H. W. Halleck, secretary of state, to Mr. Harrison, the collector, namely:—

“ This view of the subject presents a ready reply to the questions proposed in your letter. No vessel can demand as a right to enter any foreign dutiable goods here, and you will not be liable to prosecution for refusing such entry; and by a voluntary payment of her duties here, in preference to going to a regularly established port of entry, such vessel binds herself to abide by the revenue laws of the United States, in the absence of all instructions to the contrary.”

On the 3d of March, 1849, (another of the periods of time mentioned in the prayers to the court,) congress passed an act (9 Stats. at Large, 400,) making the port of San Francisco a collection district.

On the 13th of November, 1849, collector Collier, who had been regularly appointed, entered upon the execution of his duty at San Francisco. This was the third period referred to in the prayers to the court.

In April, 1851, Cross, Hobson, and Company brought an action of trespass on the case in the circuit court of the United States for the southern district of New York, against Edward H. Harrison, to recover sundry sums of money paid, under the above protest, for duties upon goods imported into San Francisco, during the period between the 3d of February, 1848, and the 12th of November, 1849.

Upon the trial, the jury, under the instructions of the court, found a verdict for the defendant.

The bill of exceptions contained the deposition of sundry persons as to the payment and other facts in the case, and also the whole of the senate document above mentioned.

The counsel for the plaintiffs then rested; and the counsel for the

plaintiffs thereupon prayed the court to charge and instruct the jury, as matter of law, as follows :—

1. That during the period from the 3d day of February, 1848, the date of the treaty of peace and limits with the republic of Mexico, and the 3d of March, 1849, the date of the act of congress which erected the State of California into a collection district of the United States, no duties accrue to the United States on merchandise not the production of the United States nor of vessels not of the United States which arrived within the limits of California, ceded by said treaty to the United States; and that the exaction by the defendant, of such alleged duties on such goods imported into California by the plaintiffs within said period, was not authorized by any law of the United States, and was therefore illegal.

2. That during the period from the 3d of March, 1849, when the act of congress erected the State of California into a collection district, and the 13th of November, 1849, when collector Collier entered upon his duties as collector of customs at the port of San Francisco, in said district, the exaction of alleged duties to the United States, by the defendant, was not authorized by any law of the United States, and was therefore illegal, unless the jury shall find that the defendant was legally appointed and qualified to act as collector of the customs at San Francisco.

3. That if the jury shall find that on the 23d February, 1849, the plaintiffs made their written protest against all exactions that then were or thereafter should be made by said defendant, as unauthorized by any act of congress and illegal, and that moneys then and thenceforward were demanded as alleged duties to the United States by said defendant, and were paid under coercion of military power and duress, and not in pursuance of any law of the United States, that then such exactions were unauthorized and illegal, and the jury must find for the plaintiffs.

4. That if the jury shall find from the evidence that alleged duties were exacted by the defendant from the plaintiffs between the 3d February, 1848, and the 12th November, 1849, by coercion and duress, and against their remonstrance and protest, that then the plaintiffs are entitled to the customary interest of California upon such exactions.

Whereupon the court, *pro forma*, then and there charged and instructed the jury in conformity with the following prayers; in conformity with which the defendant's counsel insisted and prayed the court to instruct the jury as matters of law :—

1. That between the 3d February, 1848, and the 3d March, 1849,

duties did accrue to the United States, on foreign merchandise, not the production of the United States, and on foreign vessels not of the United States, which were imported into and arrived within the limits of California, as ceded to the United States by the treaty of peace and limits with the republic of Mexico, signed at Guadaloupe Hidalgo.

2. That after the act of 3d March, 1849, erecting the State of California into a collection district of the United States, took effect, duties accrued to the United States, both on foreign merchandise, * not the production of the United States, and on [* 188] foreign vessels not of the United States, imported and brought within the limits of such collection district.

3. That if, from the evidence in the cause, the jury shall find that between the 3d February, 1848, and 12th November, 1849, the plaintiffs were allowed by the defendant to enter their said foreign goods and vessels at another port of the United States within a collection district, and thereafter to land the same at San Francisco without further exaction of duties, and that the plaintiffs neglected so to do, and elected to enter and land the same at San Francisco, and pay duties thereon, and that the duties were paid by defendant to the use of the United States, that then the said payment of duties was voluntary and not coercive, and the jury must find for the defendant.

4. That if the jury shall find that the plaintiffs paid duties to the defendant on foreign merchandise, and on foreign vessels, not of the United States, between the 3d February, 1848, and 12th November, 1849, and that such payments were illegal but voluntary, and made through mistake of law, then the plaintiffs are not entitled to interest upon such exactions, and that upon the whole evidence the payments aforesaid were voluntary and not coercive.

And the court further, *pro formâ*, refused to instruct and charge the jury in conformity with the points insisted upon by the plaintiffs' counsel, and in conformity with which he had prayed the court to charge and instruct the jury as aforesaid.

Upon this exception, the case came up to this court.

This statement presents the case of the plaintiffs as strongly as it can be made from the record, and that contains every fact and document having any connection with the subject. The cause has been argued here with much research. Every argument has been brought to bear upon it by counsel on both sides, which can enter into its consideration. It seems, from the institution of the suit, until now, to have been conducted with the wish upon the part of the United States to give to the plaintiffs every opportunity to establish their claim judicially, if that could be done; and with a desire upon its part to obtain from this court a decision as to what are the rights of

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the United States in respect to tonnage and impost duties, in such a conjuncture as that was, when California was ceded by treaty to the United States, before congress had authorized such duties to be collected there by a special act. We have received much assistance from the argument, and make the acknowledgment the more readily because it has enabled us to come to conclusions which we believe will be satisfactory, though adverse from the claim of the plaintiffs.

[* 189] * The purpose of the suit is to recover from the defendant certain tonnage duties and imposts which were paid to him by the plaintiffs upon ships which had arrived in San Francisco, and upon foreign merchandise landed there from them, between the 3d February, 1848, and the 13th November, 1849. Harrison had been appointed collector for the port of San Francisco by Colonel Mason, military governor of California. He told the plaintiffs, officially, that he would not permit them to land their goods without the payment of duties; stating if they attempted to do so, without having made an entry of them, that they would be seized and forfeited. He placed an inspector of the customs on board of the vessels of the plaintiffs, to prevent any merchandise from being landed from them without permits and entries, and when they complained that the duties which they were required to pay were illegal exactions, which they protested against, the collector refused to receive the duties under protest, and told the plaintiffs that they might enter their ships at some other port in the United States, and then discharge their goods at San Francisco. That he considered San Francisco a port in the United States at which foreign goods could not be landed without the payment of duties. It is as well to remark here, though the same fact appears in our statement of the case already given, that the duties for which the plaintiffs sue were paid by them between the 3d February, 1848, and the 12th November, 1849. They were paid, however, until some time in the fall of 1848, at the rate of the war tariff; which had been established early in the year before by the direction of the President of the United States.

The authority for that purpose given to the commander-in-chief of our naval force on that station, was to establish port regulations, to prescribe the conditions upon which American and foreign vessels were to be admitted into the ports of California, and to regulate import duties. That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as congress had imposed upon foreign merchandise imported into the other ports of

the United States, Upper California having been ceded by the treaty to the United States. This last was done with the assent of the executive of the United States, or without any interference to prevent it. Indeed, from the letter of the then secretary of state, and from that of the secretary of the treasury, we cannot doubt that the action of the military governor of California was recognized as allowable and lawful by Mr. Polk and his cabinet. We think it was a rightful and correct recognition *under all the circum- [* 190] stances, and when we say rightful, we mean that it was constitutional, although congress had not passed an act to extend the collection of tonnage and import duties to the ports of California.

California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward, the United States had military possession of all of Upper California. Early in 1847, the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. We will add, by way of note to this opinion, references to all of the correspondence of the government upon this subject; now only referring to the letter of the secretary at war to General Kearney, of the 10th of May, 1847, which was accompanied with a tariff of duties on imports and tonnage, which had been prepared by the secretary of the treasury, with forms of entry and permits for landing goods, all of which was reported by the secretary to the President on the 30th of March, 1847. Senate Doc. No. 1, 1st session, 30th congress, 1847, pp. 567, 583. No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the treaty itself. Nothing is stipulated in that treaty to be binding upon the parties to it, or from the date of the signature of the treaty, but that commissioners should be appointed by the general-in-chief of the forces of the United States, with such as might be appointed by the Mexican government, to make a provisional suspension of hostilities, that in the places occupied by our arms, constitutional order might be reëstablished as regards the political, administrative, and judicial branches in those places, so far as that might be per-

mitted by the circumstances of military occupation. All else was contingent until the ratifications of the treaty were exchanged, which was done on the 30th of May, 1848, at Queretaro; and there is in the 3d article of the treaty a full recognition by Mexico of the belligerent rights exercised by the United States during the war in its ports which had been conquered. In that article, besides [*191] other things provided for, it was stipulated that * the United States, upon the ratifications of the treaty by the two republics, should dispatch orders to all persons in charge of the custom-houses at all ports occupied by the forces of the United States, to deliver possession of the same to persons authorized by Mexico to receive them, together with all bonds and evidences of debts for duties on importations and exportations not yet fallen due, and that an exact account should be made out, showing the entire amount of all duties on imports and exports collected at such custom-houses or elsewhere in Mexico by the authority of the United States after the ratification of the treaty by Mexico, with the cost of collection, all of which was to be paid to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications, subject to a deduction of what had been the cost of collection.

The plaintiffs therefore can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded, in fact, to the United States, but it was a conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them.

But after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory. Our inquiry here is to be, whether or not the cession gave any right to the plaintiffs to have the duties restored to them, which they may have paid between the ratifications and exchange of the treaty and the notification of that fact by our government to the military governor of California. It was not received by him until two months after the ratification, and not then with any instructions or even remote intimation from the President that the civil and military government, which had been instituted during the war, was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington.

It will certainly not be denied that those instructions were binding upon those who administered the civil government in California, until they had notice from their own government that a peace had

been finally concluded. Or that those who were locally within its jurisdiction, or who had property there, were not bound to comply with those regulations of the government, which its functionaries were ordered to execute. Or that any one could claim a right to introduce into the territory of that government foreign merchandise, without the payment of duties which had been originally imposed under belligerent * rights, because the territory had [* 192] been ceded by the original possessor and enemy to the conqueror. Or that the mere fact of a territory having been ceded by one sovereignty to another, opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations, and the attempt to introduce it in this instance is resisted by all of those considerations which have made foreign commerce between nations conventional. "The treaty that gives the right of commerce, is the measure and rule of that right." Vattel, c. 8, § 93. The plaintiffs in this case could claim no privilege for the introduction of their goods into San Francisco between the ratifications of the treaty with Mexico and the official annunciation of it to the civil government in California, other than such as that government permitted under the instructions of the government of the United States.

We must consider them as having paid the duties upon their importations voluntarily, notwithstanding that they protested against the right of the collector to exact them. Their protest was made from a misconception of the principles applicable to the circumstances under which those duties were claimed, and from their misapprehension of what were the commercial consequences resulting from the treaty of peace with Mexico and the cession of California to the United States. That treaty gave them no right to carry foreign goods there upon which duties had not been paid in one of our ports of entry. The best test of the correctness of what has just been said is this; that if such goods had been landed there duty free, they could not have been shipped to any other port in the United States without being liable to pay duty.

Having considered and denied the claim of the plaintiffs to a restoration of the duties paid by them from the date of the treaty up to the time when official notice of its ratification and exchange were received in California, we pass on to the examination of their claim from that time until the revenue system in respect to tonnage and import duties had been put into practical operation in California, under the act of congress passed for that purpose. The ratification of the treaty of peace was proclaimed in California, by Colonel

Mason, on the 7th of August, 1848. Up to this time it must be remembered that Captain Folsom, of the quartermaster's department of the army, had been the collector of duties under the war tariff. On the 9th of August, he was informed by Lieutenant Halleck, of the engineer corps, who was the secretary of state of the civil government of California, that he would be relieved as soon as a [*193] *suitable citizen could be found for his successor. He was also told that "the tariff of duties for the collection of military contributions was immediately to cease, and that the revenue laws and tariff of the United States will be substituted in its place." The view taken by Governor Mason, of his position, has been given in our statement. The result was to continue the existing government, as he had not received from Washington definite instructions in reference to the existing state of things in California.

His position was unlike any thing that had preceded it in the history of our country. The view taken of it by himself has been given in the statement in the beginning of this opinion. It was not without its difficulties, both as regards the principle upon which he should act, and the actual state of affairs in California. He knew that the Mexican inhabitants of it had been remitted by the treaty of peace to those municipal laws and usages which prevailed among them before the territory had been ceded to the United States, but that a state of things and population had grown up during the war, and after the treaty of peace, which made some other authority necessary to maintain the rights of the ceded inhabitants and of immigrants, from misrule and violence. He may not have comprehended fully the principle applicable to what he might rightly do in such a case, but he felt rightly and acted accordingly. He determined, in the absence of all instruction, to maintain the existing government. The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the constitution, by which power had been given to congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have

dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption *of a contrary in- [*194]
tention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a state government, which was subsequently recognized by congress under its power to admit new States into the Union.

In confirmation of what has been said in respect to the power of congress over this territory, and the continuance of the civil government established as a war right, until congress acted upon the subject, we refer to two of the decisions of this court, in one of which it is said in respect to the treaty by which Florida was ceded to the United States: "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independently of stipulations. They do not, however, participate in political power—they do not share in the government until Florida shall become a State. In the mean time, Florida continues to be a territory of the United States, guarded by virtue of that clause in the constitution which empowers congress to make all needful rules and regulations respecting the territory or other property belonging to the United States. Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the natural consequences of the right to acquire territory." *American Insurance Co. v. Canter*, 1 Pet. 542, 543.

The court, afterwards, in the case of the *United States v. Gratiot*, 14 Pet. 526, repeats what it said in the case of *Canter* in respect to that clause of the constitution giving to congress the power to make all needful rules and regulations respecting the territory or other property of the United States.

Colonel Mason was fortunate in having his determination to continue the existing government sustained by the President of the United States and the secretaries of his cabinet. And nothing but an almost willing misunderstanding of the circular of the secretary of the treasury, Mr. Walker, could have caused a doubt as to the liabil-

ity of the importers of foreign goods into California to pay duties upon them. That part of the secretary's circular relating to duties is in our statement of the case. It will show that the secretary says no more than this: that as congress had not brought California by law within the limits of any collection district, or authorized the appointment of officers to collect the revenue accruing upon the importation of foreign dutiable goods into that territory, that his department may be unable to collect them. Revenue accruing upon the importation, into California, of foreign dutiable goods, means that the goods were liable to pay the duty. There is nothing uncertain in the secretary's circular. It does not warrant in any way the declaration that it was his opinion that the goods were not dutiable, or that they might not be legally collected, though that could not be done by the instrumentality of officers of a collection district. Our conclusion, from what has been said, is, that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the constitution or laws of the United States, and that, until congress legislated for it, the duties upon foreign goods, imported into San Francisco, were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason.

But it was assumed in the argument, and not without force and ingenuity, and with some appearance of authority, that duties did not accrue to the United States upon foreign goods brought into California between the 3d of February, 1848, and the 3d of March, 1849, and from the last date until the 12th of November, 1849; and that the exaction of them was illegal. The first two dates mentioned, comprehend the time between the date of the treaty and the date of the act of congress which included California within one of the collection districts of the United States, and the other date comprehends the time from the date of the act of congress until Mr. Collier, the collector, entered upon the duties of his office. It was also said by counsel, that as there was no treaty or law enjoining or permitting the collection of the duties, that the exaction of them by the defendant was illegal. It was said, that the duties were illegally exacted, because the laws of a ceded country, including those of trade, remained unchanged until the new sovereignty of it changed them, and that this congress had not done. That the practice of the United States had been, not to collect duties upon importations upon goods brought into a ceded territory, until congress passed an act for it to be

done. Louisiana and Florida were the instances cited ; and the ratification by North Carolina and Rhode Island of the constitution of the United States, were also mentioned as having been the subjects of special legislation to bring them within the operation of the revenue laws which had been passed by congress.

* And it was said, that as congress has the constitutional [*196] power to regulate commerce, and had not done so specifically in respect to tonnage and import duties in California, that none of the existing acts of congress, for such purposes, could be applied there until congress had passed an act giving to them operation, and had legislated California into a collection district, with denominated ports of entry.

This last being the most important of the objections which were made, we will examine it first, and afterwards notice those which precede it. The objection assumes, that, under the laws then in force, duties could not be collected in California after the war with Mexico had been concluded by a treaty of peace ; and that the President had no legal authority to order the collection of duties there upon foreign goods, or power to enforce any revenue regulations, or to prevent the landing of goods prior to the passage of the act, by which our revenue laws were extended to California, and before proper officers had been appointed to execute those laws. It has already been shown, that for seven months of the time, the duties received were paid under the war tariff, and that the treaty, though signed in 1848, did not become operative until the ratifications and exchanges of it. And further, that it could not have any effect upon the existing government of California, until official information of those ratifications had been received there. The belligerent right of the United States to make a civil government in California when it was done, and to authorize it to collect tonnage and impost duties whilst the war continued, is admitted.

It was urged, that our revenue laws covered only so much of the territory of the United States as had been divided into collection districts, and that out of them no authority had been given to prevent the landing of foreign goods or to charge duties upon them, though such landing had been made within the territorial limits of the United States. To this it may be successfully replied, that collection districts and ports of entry are no more than designated localities within and at which congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district, must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations, that each nation may designate, upon its own terms, the

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ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere, within its jurisdiction, is a violation of its sovereignty. It is not necessary that such should be declared in terms, or by any decree or enactment, the expressed allowances being the limit of the liberty given to [*197] foreigners to trade with such nation. * Upon this principle, the plaintiffs had no right of trade with California with foreign goods, excepting from the permission given by the United States under the civil government and war tariff which had been established there. And when the country was ceded as a conquest, by a treaty of peace, no larger liberty to trade resulted. By the ratifications of the treaty, California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which congress had passed to raise a revenue from duties on imports and tonnage. It was bound by the 18th section of the act of 2d of March, 1799. The fair interpretation of the second member of the first sentence of that section is, that ships, coming from foreign ports into the United States, were not to be permitted to land any part of their cargoes in any other than in a port of delivery, confined then to the ports mentioned in the act; afterward applicable to all other places which might be made ports of entry and delivery, and excluding all right to unlade in any part of the United States which had not been made a collection district with ports of entry or delivery. The 92d section of that act had four objects in view. First, to exclude foreign goods subject to the payment of duties from being brought into the United States, except in the localities stated, otherwise than by sea. Next, that they were not to be brought by sea in vessels of less than thirty tons burden. And third, to subject to forfeiture any foreign goods which might be landed at any other port or place in the United States than such as were designated by law. Fourth, to exclude the allowances of drawback of any duties on foreign goods exported from any district in the United States otherwise than by sea, and in vessels less than thirty tons burden. The 63d section, also, of that act, directing when tonnage duties were to be paid, became as operative in California after its cession to the United States, as it was in any collection district.

The acts of the 20th July, 1790, (1 Stats. at Large, 135, c. 30,) and that of 2d March, 1799, (1 Stats. at Large, 627, c. 22,) were also of force in California without other special legislation declaring them to be so. It cannot very well be contended that the words "entered in the United States," give an exemption from them on account of the word entered, because a ship has been brought into a port in the

United States where an entry cannot be made, as it may be done in a collection district. The goods must be entered before a permit for delivery can be given. Shall one then be permitted to land goods in any part of the United States not in a collection district, because he has voluntarily gone there with his vessel where an entry of his * goods cannot be made; or to say, I know that my [* 198] goods cannot be entered where I am, and therefore claim the right to land them for sale and consumption free of duty?

It has been sufficiently shown that the plaintiffs had no right to land their foreign goods in California at the times when their ships arrived with them, except by a compliance with the regulations which the civil government were authorized to enforce — first, under a war tariff, and afterward under the existing tariff act of the United States. By the last, foreign goods, as they are enumerated, are made dutiable — they are not so because they are brought into a collection district, but because they are imported into the United States. The tariff act of 1846 prescribes what that duty shall be. Can any reason be given for the exemption of foreign goods from duty because they have not been entered and collected at a port of delivery? The last become a part of the consumption of the country, as well as the others. They may be carried from the point of landing into collection districts within which duties have been paid upon the same kinds of goods; thus entering, by the retail sale of them, into competition with such goods, and with our own manufactures, and the products of our own farmers and planters. The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the constitution which enjoins that all duties, imposts, and excises, shall be uniform throughout the United States. Indeed, it must be very clear that no such right exists, and that there was nothing in the condition of California to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in the other ports of the United States. As to the denial of the authority of the President to prevent the landing of foreign goods in the United States out of a collection district, it can only be necessary to say, if he did not do so, it would be a neglect of his constitutional obligation “to take care that the laws be faithfully executed.”

We will here briefly notice those objections which preceded that which has been discussed. The first of them, rather an assertion than an argument — that there was neither treaty nor law permitting the collection of duties — has been answered, it having been shown that the ratifications of the treaty made California a part of the United States, and that, as soon as it became so, the territory became

subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right.

The second objection states a proposition larger than the [* 199] case * admits, and more so than the principle is, which secures to the inhabitants of a ceded conquest the enjoyment of what had been their laws before, until they have been changed by the new sovereignty to which it has been transferred. In this case, foreign trade had been changed in virtue of a belligerent right before the territory was ceded as a conquest, and after that had been done by a treaty of peace, the inhabitants were not remitted to those regulations of trade under which it was carried on whilst they were under Mexican rule; because they had passed from that sovereignty to another, whose privilege it was to permit the existing regulations of trade to continue, and by which only they could be changed. We have said, in a previous part of this opinion, that the sovereignty of a nation regulated trade with foreign nations, and that none could be carried on except as the sovereignty permits it to be done. In our situation, that sovereignty is the constitutional delegation to congress of the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In respect to the suggestion that it has not been the practice of the United States to collect duties upon importations of foreign goods into a ceded territory until congress had passed an act for that purpose, counsel cited the cases of Louisiana and Florida. The reply is, that the facts in respect to both have not been recollected. There was no forbearance in either instance, in respect to duties upon imports, until congress had acted. Louisiana was ceded by a treaty bearing the date of the 30th of April, 1803,¹ but the possession of it by the United States depended upon the terms of final ratifications by the parties to it, and upon the delivery of it by a commissioner to be appointed by the French government to receive the transfer from Spain to France, and by him to be immediately transferred to the United States. Articles 1, 2, 4, 5.

The surrender from Spain to France was formally made on 30th of November, 1803, and that to the United States was done on the 20th of December, 1803. It was known in Washington, by a letter from the commissioner appointed to receive it, early in January. It is said, that from that time until the act of the 24th of February,² or, as was provided for in the act, until thirty days after, Louisiana was not considered, in a fiscal sense, as a part of the United States; and that duties were not only not collected by the United States on im-

¹ 8 Stats. at Large, 200.

² 2 Ib. 251.

portations into Louisiana, but that duties were charged on goods brought from Louisiana into the United States. It seems to have been forgotten that our commercial intercourse with Louisiana had been the subject of legislation by congress in several particulars *from the year 1800; and that, before the revenue [* 200] system could be applied, it was necessary to repeal that special legislation. Mr. Gallatin, in his report of the 25th of October, 1803, (American State Papers, Finance, vol. 2, 48,) suggested that it should be done. Congress, however, did not do so until the act of the 24th of February, 1804, was passed, by the third section of which the repeal was effected. The postponement of the operation of the act for thirty days longer, was with the view to prevent any conflict of rights or interests between what would be the new regulations of commerce under the act, and those which had preceded them.

It is only necessary to say as to Florida, that the treaty of the 22d February, 1819,¹ was not ratified by the United States until the 19th February, 1821. In a few days afterward the act² was passed extending our revenue system to it, subject to the stipulation in the 15th article of the treaty in favor of Spanish vessels and their cargoes. There was, then, no interval in either instance where duties were not collected upon foreign importations, because congress had not legislated for it to be done.

The application of the revenue acts to North Carolina³ and Rhode Island,⁴ when those States had ratified the constitution of the United States, though that was not done until the constitution had been ratified by eleven of the States, does not support the position taken by the counsel of the plaintiff in error. Those States had been parties to the confederation, and North Carolina was represented in the convention which formed the constitution. It was to become the government of the Union when ratified by nine States. It had been ratified by eleven States, and congress declared that it should go into operation on the 4th day of March, 1789. The subsequent ratifications by North Carolina and Rhode Island made them parties in the government. It brought them in, without new forms or legislation, and their senators and representatives were admitted into congress upon the presentation of their ratifications. Special acts were passed, to apply to them the previous legislation of congress, and that of the revenue acts, as a matter of course, because, previously to the ratification, those States had not been attached to any collection district. But it was not supposed by any one that after those States had ratified the constitution, that foreign goods could have been imported

¹ 8 Stats. at Large, 252.² 8 Ib. 637.³ 1 Ib. 99.⁴ Ib. 126

into them without being subject to duty, or that it was necessary to make them collection districts to make such importations dutiable.

But we do not hesitate to say, if the reasons given for our conclusions in this case were not sound, that other considerations [* 201] * would bring us to the same results. The plaintiffs carried these goods voluntarily into California, knowing the state of things there. They knew that there was an existing civil government instituted by the authority of the President, as commander-in-chief of the army and naval forces of the United States, by the right of conquest; that it had not ceased when these first importations were made; that it was afterwards continued, and rightfully, as we have said, until California became a State; that they were not coerced to land their goods, however they may have been to pay duties upon them; that such duties were demanded by those who claimed the right to represent the United States—who did so, in fact, with most commendable integrity and intelligence; that the money collected has been faithfully accounted for, and the unspent residue of it received into the treasury of the United States; and that the congress has by two acts adopted and ratified all the acts of the government established in California upon the conquest of that territory, relative to the collection of imposts and tonnage from the commencement of the late war with Mexico to the 12th November, 1849, expressly including in such adoption the moneys raised and expended during that period for the support of the actual government of California after the ratification of the treaty of peace with Mexico. This adoption sanctions what the defendant did. It does more—it affirms that he had legal authority for his acts. It coincides with the views which we have expressed in respect to the legal liability of the plaintiffs for the duties paid by them, and the authority of the defendant to receive them as collector of the port of San Francisco.

From these circumstances, the law will not imply an *assumpsit* upon the part of the defendant to repay the money received by him from them for duties; the plaintiffs knew, when they paid him, that the defendant received them for the United States. The plaintiffs have no claim for damages against the defendant in justice or equity. They paid duties to which the United States had a rightful claim, and no more than the law required. The plaintiffs have paid no excess. The moneys were paid under no deceit, no mistake; the defendant has honestly paid them over to the United States, has been recognized as their agent when he acted as collector, and is not responsible to the plaintiffs *in foro conscientiae*. The moneys were paid from a portion of the funds in the treasury of the United States,

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subject to the constitutional restriction that no money shall be drawn from the treasury but in consequence of appropriations made by law for such purposes as the constitution permits. Our conclusion is, that the rulings made in this case in *the circuit [*202] court are correct. We shall direct the judgment to be affirmed.

NOTE.

The following are the documents referred to in the above opinion : —

- 1847, October 13. Mr. Marcy to Colonel Mason.
- 1848, July 26. Colonel Mason's Custom-House Regulations.
- 1848, August 7. Colonel Mason's Proclamation, announcing the ratification of the Treaty of Peace.
- 1848, October 7. Mr. Buchanan to W. B. Voorhees.
- 1848, October 7. Mr. Walker's Circular.
- 1848, October 9. Mr. Marcy to Colonel Mason.
- 1849, March 15. Persifor F. Smith to Adjutant-General Jones.
- 1849, April 1. Persifor F. Smith's Circular to Consuls.
- 1849, April 3. Mr. Clayton to Thomas Butler King.
- 1849, April 3. Mr. Meredith to James Collier, Collector.
- 1849, April 5. Persifor F. Smith to Adjutant-General Jones.
- 1849, June 20. Persifor F. Smith to Mr. Crawford, Secretary of War.
- 1849, June 30. General Riley to Adjutant-General Jones.
- 1849, August 30. General Riley to Adjutant-General Jones.
- 1849, October 1. General Riley to Adjutant-General Jones.
- 1849, October 20. Carr, Acting Deputy-Collector, to Mr. Meredith.
- 1849, October 31. General Riley to Adjutant-General Jones.
- 1849, November 13. Mr. Collier, Collector, to Mr. Meredith.

17 H. 447; 19 H. 393; 23 H. 495.

HENRY CHOUTEAU, Plaintiff in Error, v. PATRICK MOLONY.

16 H. 203.

The title of Dubuque, under an alleged grant from the Fox Indians, confirmed by the Spanish governor of Louisiana, held to be merely a permit to work mines, and occupy for that purpose the needful land.

ERROR to the district court of the United States for the district of Iowa. The case is stated in the opinion of the court.

Cornick and Johnson, for the plaintiff.

Smith, Wilson, and Cushing, (attorney-general,) *contra*.

* WAYNE, J., delivered the opinion of the court.

It is necessary to make a statement of the facts of the [* 221] case * from the pleadings, in order that the opinion which we shall give may be fully understood.

It is a suit for the recovery of land, but not according to the form of the proceedings in ejectment. It is a petition according to the course of pleading allowed in the courts of Iowa, (which has been adopted by the district court of the United States,) setting forth in detail the facts upon which the petitioner claims the ownership of the land.

The petitioner, Henry Chouteau, states that he is the owner of several tracts of land, and that they are wrongfully withheld from him by the defendant, Patrick Molony. It is admitted that Molony purchased the lands from the United States, and that he has a patent for them. But the validity of the patent is denied, upon the ground that the land had been granted to Julien Dubuque by the authorities of Spain, before Louisiana had been transferred by France to the United States.

Dubuque's claim is said, by the petitioner, to be a purchase from the Fox Indians of a large tract of land situated in what is now the Dubuque land district.

It is described as bordering on the Mississippi River, extending from the Little Makoketa River to the mouth of the Musquabinenque Creek, now called Tête des Morts. The purchase, it is said, was made at Prairie du Chien, from the chiefs of the Fox Indians, on the 22d September, 1788. In proof of it, an instrument in writing, in French, is produced, with a translation into English.

It is further stated that Dubuque paid the Indians for the land in goods when the writing was executed. The petitioner then states, that the chiefs of the Fox Indians, a few days afterwards, assented to the erection of monuments, and that they were erected at the mouths of the rivers just mentioned, as evidence of the upper and lower boundaries of the tract of land.

It is also said that Dubuque occupied the land from the time it was sold to him; that he made improvements on it, cleared an extensive farm, constructed upon it houses and a horse-mill; that he cultivated the farm, and dug lead ore from the land, which he smelted in a furnace constructed for that purpose. This land was in the Spanish province of Louisiana; Dubuque resided on this land from 1788 to his death in 1810. Upon his first settlement there, he employed ten white men as laborers, who removed from Prairie du Chien to enter his service; that the white inhabitants who resided on the land were almost entirely persons who had been inhabitants of Prairie du

Chien before Dubuque made his settlement, and that other persons from that town entered into his service in the interval between the date of his contract with the Indians and the time when he applied *to the governor of Louisiana, the Baron de Ca- [* 222] rondelet, for the confirmation of the sale of the Indians to him. It also appears that Dubuque, from the time he made his settlement until the province of Louisiana was transferred to the United States, did not permit any one to carry on business on the land without having first obtained his consent, and that he drove forcibly from it a person named Guérien, who came there with goods to trade.

It seems, too, that Dubuque was a man of enterprise; that, during his residence upon this land, he exercised great influence over the Indians on both sides of the Mississippi River; and that the Winnebagoes on the east of it, and the Foxes on the west of it, were in the habit of consulting with him upon their more important concerns.

It will be remembered that Dubuque's settlement on the land began with the date of his bargain with the Fox Indians, which was the 22d of September, 1788. Eight years afterwards, or, to be precise, on the 22d of October, 1796, Dubuque presented to the Baron de Carondelet, at the city of New Orleans, his petition for a grant to him of the land which he alleges he bought from the Fox Indians, by his contract with them of the 22d of September, 1788, and their subsequent assent to the erection of the monuments upon the Makoketa and Tete des Morts, as designations of the boundary of the land on the Mississippi River. The governor referred his petition to Andrew Todd, an Indian trader, who had received a license for a monopoly of that trade, for Todd to give to him information of the nature of Dubuque's demand. Todd replied, that he had acted upon the reference of the memorial, saying, that as to the land for which he asked, nothing occurred to him why it should not be granted, if you deem it advisable to do so; with the condition, nevertheless, that Dubuque should observe his majesty's provisions relating to the trade with the Indians, and that he should be absolutely prohibited from doing so unless he shall have Todd's consent in writing.

Upon this answer of Todd, Governor Carondelet makes this order: Granted as asked, under the restrictions expressed in the information given by the merchant, Andrew Todd.

The contract with the Indians, Dubuque's petition to the governor, the reference of it to Todd, Todd's return of it with his written opinion, and the governor's final order, are here annexed.

The exhibit referred to in the petition, and filed therewith, and marked A, is in the words and figures following, to wit: —

Exhibit A. — Conveyance from Foxes to Dubuque.

Copie de conseil tenu par Messrs. les Renards, c'est à dire, [* 223] le * chef et le brave de cinque villages avec l'approbation du reste de leur gens, expliqué par Mr. Quinantotaye, député par eux, en leur presence et en la notre, nous soussignés sçavoir, que les Renards permette à Julien Dubuc, appelé par eux la petite nuit, de travailler à la mine jusqu'à qui lui plaira, des s'en retirer sans lui specifier aucun terme; de plus, qu'il lui vende et abandonne toute la côté et contenu de la mine trouve par le femme Peosta, que sans qu'aucuns blancs ni sauvages, ni puissent pretendre sans le consentement du Sr. Julien Dubuc; et si en cas ne trouve rien dedans, il sera mètre de cherche où bon lui semblera, et de travailler tranquillement, sans qu'aux qu'un ne puisse le nuire, ni portez aucune prejudice dans ses travaux; ainsi nous, chef et brave, par la voie de tous nos villages, nous sommes convenu avec Julien Dubuque, lui vendant et livrant de ce jour d'hui comme il est mentionné ci-dessus, en presence de François qui nous attende, qui sont les temoins de cette pièce, à la Prairie du Chien, en plein conseil le 22 7br., 1788.

BLONDEAU,

sa

ALA ✕ AUSTIN,

marque.

AUTAQUE.

sa

BAZIL ✕ TERENCE, temoin,

marque.

marque

BLONDEAU ✕ DE QUIRNEAU,

tobague.

JOSEPH FONTIGNY, temoin.

The exhibit referred to in the petition, and filed therewith, and marked B, is in the words and figures following, to wit: —

Exhibit B. — A Translation of A.

Copy of the council held by the Foxes, that is to say, of the branch of five villages, with the approbation of the rest of their people, explained by Mr. Quinantotaye, deputed by them in their presence, and in the presence of us, the undersigned, that is to say the Foxes, permit Mr. Julien Dubuque, called by them the Little Cloud, to work at the mines as long as he shall please, and to withdraw from it, without specifying any term to him; moreover, that they sell and abandon to him all the coast and the contents of the mine discov-

ered by the wife of Peosta, so that no white man or Indian shall make any pretension to it without the consent of Mr. Julien Dubuque; and in case he shall find nothing within, he shall be free to search wherever he may think proper to do so, and to work peaceably without any one hurting him, or doing him any prejudice in his labors. * Thus we, chief and braves, by the voice of all our [* 224] villages, have agreed with Julien Dubuque, selling and delivering to him this day, as above mentioned, in presence of the Frenchmen who attend us, who are witnesses to this writing.

At the Prairie du Chien, in full council, the 22d of September, 1788.

BLONDEAU,
ALA AUSTIN, his \times mark.
AUTAQUE.

BAZIL TEREEN, his \times mark,

marque

BLONDEAU DE \times QUIRNEAU,

tobague.

JOSEPH FONTIGNY.

Witnesses.

The exhibit referred to in the petition, and filed therewith, and marked H H, is in the words and figures following, to wit:—

Exhibit H H. — Petition of Dubuc to Carondelet, &c.

A son excellence le BARON DE CARONDELAIS : —

Le tres humble suplyent de vôtres excellence, nommé Julien Dubuque, aiant faites une abbitation sur les frontier de vôtres gouvernements, au millieux des peuples sauvages, qu'il sont les âbiteurs du pays a achetée une partye de terre de ces indients avec les mines qu'il quontient, et par sa parsaverances a surmonter tous les optacles tous contenzes que densgerenzenes est parvenue approi bien des travences à être paysibles possesseures d'unnes partye de terre sur la rives occidentale du Mississypi, à quil il a donnée le nom des mines d'Espagnes, en mémoire du gouvernements aqui il appartenais. Comme le lieux de l'abitation n'est qu'un point, et les diferentes mines qu'il travailles sont et parts et à plus de trois lieux de distences les unes des autres, le très humbles suppliant prit vôtres excellences de vouilloir bient lui accorder la paysibles possessions des mines et des terres, qui ai à dire, depuis les cautes d'eau aux de la petites Rivier Maquanquitois jusque au quantes de Mesquabysnanques, ce qu'il formes environent sept lieux sur la rives occidentale du Mississipy, sur trois lieux de profondeur, que le très humbles suppliant *anzes* esperer que vos bontée vousdrats bien lui accorder sa demandes et prit settes même bonti qu'il fait le bonheur de tous de sugaits, de me

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pardonner mon stille, et de vousloir bient aprouver la pure simplicitée de mon cœur au defaux de mon elloquences. Je prie de ciel de tous mon pouvoir possibles qu'il vous conserve et qu'il vous combless de tous ses bientfait; et je sui et serez toutes ma vie, de vosres excellences le très humbles et très auxbeissants, et très soumis serviteur.

J. DUBUQUE.

[* 225]

** Order to Todd.*

Nueva Orleans, 22 de Octubre de 1796.

Informe el comerciante Dn. Andres Todd, sobre la naturaleza de esta demanda.

EL BARON DE CARONDELET.

Information of Todd.

S'or Gob'or: Compliendo con el superior decreto de V. S. en que me manda informar sobre la solicitud del individuo interesado en el antecedente memorial, debo decir, que en quanto à la tierra que pide, nada se me ofrece, en que V. S. se la conceda, si lo halla por conveniente, con la condicion sin embargo de observara el concesionario lo prevenido por S. M. acerca de la treta con los Indios, y que esta se le prohibira absolutamente à menos que notenga mi consentimiento por escrito.

Na. Orleans, 29 de Octubre de 1796.

ANDREW TODD.

Order of Carondelet to Dubuc.

Nueva Orleans, de Noviembre de 1796.

Concedido como se solicita baxo las restricciones que el comerciante Dn. Andres Todd expresa en su informe.

EL BARON DE CARONDELET.

Certificate that H H is a true copy of the original paper withdrawn by plaintiff, by leave of court.

The foregoing two pages have been prepared by me in pursuance of an order of court to that effect, and is a true copy of Dubuque's petition, the interlocutory orders of the Baron de Carondelet and Andrew Todd, and the final order of the Baron de Carondelet.

Witness my hand, this 9th January, 1852.

T. S. PARVIN, Clerk.

The exhibit referred to in the petition, and filed therewith, and marked C, is in the figures and words following, to wit:—

Translation of H H.

To his excellency, the Baron de Carondelet:—

Your excellency's very humble petitioner, named Julien Dubuque, having made a settlement on the frontiers of your government, in

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the midst of the Indian nations, who are the inhabitants of the country, has bought a tract of land from these Indians, with the mines it contains, and by his perseverance has surmounted all the obstacles, as expensive as they were dangerous, and, after many voyages, has come to be the peaceable possessor of a tract of land on the western bank of the Mississippi, to which [tract] he has given the name of the * "Mines of Spain," in memory of [* 226] the government to which he belonged. As the place of settlement is but a point, and the different mines which he works are apart, and at a distance of more than three leagues from each other, the very humble petitioner prays your excellency to have the goodness to assure him the quiet enjoyment of the mines and lands, that is to say, from the margin of the waters of the little River Maquanguitois to the margin of the Mesquabysnonques, which forms about seven leagues on the west bank of the Mississippi, by three leagues in depth, and to grant him the full proprietorship¹ thereof, which the very humble petitioner ventures to hope that your goodness will be pleased to grant him his request. I beseech that same goodness which makes the happiness of so many subjects, to pardon me my style, and be pleased to accept the pure simplicity of my heart in default of my eloquence. I pray Heaven, with all my power, that it preserve you, and that it load you with all its benefits; and I am, and shall be all my life, your excellency's very humble, and very obedient, and very submissive servant.

J. DUBUQUE.

New Orleans, October 22, 1796.

Let information be given by the merchant, Don Andrew Todd, on the nature of this demand.

THE BARON DE CARONDELET.

Senor Governor: In compliance with your superior order, in which you command me to give information on the solicitation of the individual interested in the foregoing memorial, I have to say that, as to the land for which he asks, nothing occurs to me why it should not be granted, if you deem it advisable to do so; with the condition, nevertheless, that the grantee shall observe the provisions of his majesty relating to the trade with the Indians; and that this be absolutely prohibited to him, unless he shall have my consent in writing.

New Orleans, October 29, 1796.

ANDREW TODD.

New Orleans, November 10, 1796.

Granted as asked, under the restrictions expressed in the information given by the merchant, Don Andrew Todd.

THE BARON DE CARONDELET.

¹ "Peaceable possession" is the proper translation of the original.

The defendant in this suit demurred, and, for causes of demurrer, says:—

1. Admitting all the facts of the petition to be true, the plaintiff is not entitled to recover.

[* 227] *2. As it appears by the exhibits to the petition that the plaintiff claims under an unconfirmed Spanish title, he has no standing in a court of law.

3. That it appears, from the plaintiff's own showing, that he rests his title upon an incomplete Spanish grant, and that the defendant is in possession under a complete title from the United States.

It appears, then, that the petitioner claims under the Indian instrument of writing, termed by him a sale, and in virtue of a confirmation of it into a grant by the governor of Louisiana, the Baron de Carondelet, dated the 10th November, 1796. We shall consider the case, as it was argued by all of the counsel, as presenting but one question.

Was the grant which the Baron de Carondelet made to Julien Dubuque, a complete title, making the land private property, and therefore excepted from what was conveyed to the United States by the treaty of Paris of the 30th April, 1803? ¹

Our inquiry begins with the examination of that paper introduced by the petitioner as the Indian contract of sale to Dubuque.

After reciting that the paper is a copy of the council held by the Foxes and the braves of the five villages, with the approbation of the rest of their people, these words are found in that paper: "The Foxes permit Mr. Julien Dubuque, called by them the Little Cloud, to work at the mine as long as he shall please, and to withdraw from it without specifying any time to him; moreover, that they sell and abandon to him all of the coast or hills and contents of the mine discovered by the wife of Peosta, so that no white man or Indian shall make any pretension to it without the consent of Mr. Julien Dubuque; and in case he shall find nothing within, he shall be free to search wherever he may think proper to do so, and to work peaceably, without any one hurting him or doing him any prejudice in his labors." From these terms, it is plain that Dubuque was treating with the Indian council for a mine, the mine of Peosta, with all the coast or hill, and the contents of that mine, with the privilege to open other mines, protected in doing so from all interferences in the event that he should not find ore in the Peosta mine. The words, that they sell and abandon to him all the coast and the contents of the mine discovered by the wife of Peosta, are the only words from which it can be implied that they were selling land. Admitting that they do so,

¹ 8 Stats. at Large, 200.

the words "all the coast" of the mine Peosta cannot be enlarged to mean more than the land which covered its ramifications, and the land contiguous to them, which was necessary for the operations of the miners and for their support. We say so because such were *the allowances under the mining ordinances of Spain. [* 228] We shall see hereafter how that was determined by the Spanish ordinances regulating the mines. But to make it more certain that the Indians meant to sell a mine, and that Dubuque was bargaining for a mine, the contract of sale conveying it to him, with the extended privilege to open other mines if that bought should turn out to be deficient in ore, the council conclude their paper thus: "We, the chiefs and braves, by the voice of all of our villages, have agreed with Julien Dubuque, selling and delivering to him this day, as above mentioned, in the presence of the Frenchmen who attend us, who are witnesses of this writing." There are no words in this paper, except the words "all the coast" of the mine of Peosta, conveying any other land, either as to locality, quantity, or boundary. When it is remembered, too, that this paper or contract was written by Frenchmen, and that one of them explained to the Indians what it meant or what the paper contained, and that it was witnessed by other Frenchmen, some of whom could read and write, it is hard for us to suppose that they meant by it to convey to Dubuque the large tract of land which he afterwards claimed, or that they did not honestly, fairly, and fully write only that which the Indians meant to do. At all events, if the words of the paper are doubtful as to what the Indians meant to sell, as the copy of the council is written in a language which they could neither read nor fully understand, it will be but right to hold it as an uncertainty, and not to permit their bargainee, Dubuque, or his alienees, to give it a fixed meaning in their own favor.

But let it be admitted that the words of the copy of this Indian council are obscure and ambiguous, so as to express its meaning imperfectly, and that a resort may be made to exterior circumstances connected with the transaction to ascertain its intention. There are no such proofs in the case — nothing of the kind to guide us to a different conclusion than that which the paper expresses. Dubuque, the interested party, is made to say, in the plaintiff's petition, that a few days after the Indian sale was executed, the chief, in the presence of Dubuque, assented to the erection of monuments at the mouth of the Little Makoketa, and at the mouth of the Tête des Morts, as evidence that the former was the upper and the latter the lower end of the Mississippi River boundary line of the large tract, and that the monuments were actually erected. With the exception

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of the erected monuments, the same is repeated in Dubuque's memorial to Governor Carondelet for a grant; but with this remarkable addition for the first time, that the tract from the points mentioned on the river was to a depth of three leagues. This depth is [* 229] not in the copy of the Indian council. It was not * stipulated for by Dubuque, nor in any way mentioned by or to the chiefs when they assented to the erection of monuments. It will be seen at once that it was necessary for him to give depth to the tract when he applied to the governor for a grant, in order to give certainty to his previous declaration that he had bought the land from the Indians. Without having a given depth, the tract could not have been surveyed as to quantity or boundaries. On that account it would, under the Spanish law, as well as our own, have been void for its uncertainty. Indeed, we cannot think otherwise than that the statement in the petition in this case is contradictory to Dubuque's petition for a grant of the land, and that the first must be taken as the fullest extent of any arrangement between Dubuque and the Indians subsequently to their sale to him of the Peosta mine, with a privilege to search elsewhere if that mine should fail. The erection of monuments within certain distances upon the river, was consistent with the privilege to search for other mines. In the absence of all words from which it can be inferred that a sale of land as meant, the monuments, as points mentioned on the river, can have no other reference than to the privilege to search for mines. This, in our view, is the sound interpretation of the Indian contract, and the statement made of it in the petition in this suit.

It would certainly be a novelty, even in the looseness with which grants of land were made in Louisiana, if a grantee or one claiming under him was permitted by his own declaration to amend and enlarge a specification defective in the particulars of quantity and boundaries.

Our interpretation of the paper, given by the Fox Indians to Dubuque, will be much strengthened, if it needs it, by a brief statement of what were the rights of the Indians in those lands and to the mines.

Spain, at all times, or from a very early date, acknowledged the Indians' right of occupancy in these lands, but at no time were they permitted to sell them without the consent of the king. That was given either directly under the king's sign-manual, or by confirmation of the governors representing him. As to the mines, whether they were on public or private lands, and whether they were of the precious or baser ores, they formed a part of what was termed the royal patrimony. They were regulated and worked by ordinances from the king. These ordinances were very many, differing, and contra-

dictory. It is very difficult, though aided by the best commentaries upon them, to determine in all instances how far the older ordinances were repealed by those subsequently made, or how much of both of them remained in force. As to the rights of the crown, however, * there can be no uncertainty. By the law of [*230] The Partida, law 5, title 15, Partida 2, Rockwell, 126, the property of the mines was so vested in the king that they were held not to pass in a grant of the land, although not excepted out of the grant; and though included in it, the grant was valid as to them only during the life of the king who made it, and required confirmation by his successors.

The law 11, title 28, Partida 3:—

“ The returns from the port, salt-works, fisheries, and iron-works, and from the other metals, belonging to the emperors and kings, and all these things were granted to them that they might have wherewith an honorable establishment to defend their lands and kingdoms, and to carry on war against the enemies of the faith, and that they might have no need to load their people with great or grievous burdens.” Rockwell, 126. Rockwell also says, by the law 8, title 1, book 6, of the Ordenamiento Real, (we have not seen the original,) copied in law 2, title 13, book 6, Collection of Castile, that all mines of gold, silver, or any other metal whatsoever, and the produce of the same, were declared to be the property of the crown, and no one was to presume to work them except under some especial license or grant previously obtained, or unless authorized by immemorial prescription. This rule was afterwards moderated by law 1, title 13, book 6, Collection of Castile, so far as to permit any person to dig or work mines in his own land or inheritance, or with the permission of the proprietor in that of any other individual; the miner retaining for himself, after deducting expenses, one third of the produce, rendering the other two thirds to the king. Rockwell, 126. Subsequently, the profitless return of the mines in the Spanish dominions induced Philip II. acting with the council and chief accountants of the mines, to reserve all grants which had been made of them, whether they were in private or in public ground. The object of this proceeding was to throw open to all of his subjects the right to search for mines both in public and private grounds, giving to the owner of the latter a compensation for damages and a third part of the produce. Law 4, title 13, book 6, Collection of Castile, Rockwell, 126. By a second ordinance of Philip, all persons, natives and foreigners, were permitted to search for mines. It was declared that the finders of them should have a right of possession and property to them, with a right to dispose of them as of any thing of their own, pro-

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vided they complied with the rules of the ordinance, and paid to the crown the seignorage required. These privileges were afterwards extended to the Indians by name, as may be seen by law 1, title 19, book 4, Collection of the Indies. Rockwell, 128-387.

[*231] Such were *the regulations of Spain in respect to the rights of the Indians in lands and mines before Louisiana became a part of her dominions, from the cession of it by France in 1763.

What were the regulations of France in respect to mines in her colonies, we need not inquire into, as the transaction we have before us happened after France had parted with the province, and after Spain had legislated new ordinances upon the subject of mines, which were applicable to all of her dominions, as well those in North as in South America. We mean the ordinances entered in the general land-office of the Indies, at Madrid, the 25th of May, 1783. In chapter 5 of these ordinances, the king declares that mines are the property of his royal crown; that without separating them from his royal patrimony, he grants them to his subjects in property and possession, in such manner that they may sell, exchange, pass by will, either in the way of inheritance or legacy, or in any other manner to dispose of all their property in them, upon the terms they themselves possess them, to persons legally capable of acquiring. The grant depended upon two conditions: that the proportions of metal reserved were paid into the royal treasury, and that the mines were worked subject to the ordinances. To all the subjects of the king's dominions, "both in Spain and the Indies, of whatever condition or rank they may be," were granted the mines of every species of metals, but foreigners were not permitted to acquire or work mines as their own property, unless they were naturalized, or did so expressly under a license. The right of the Indians to work the mines, upon their own account, was at one time questioned. It was determined that they could do so. Law 14, title 19, book 4, Collection of the Indies, Rock. 137. And the mines discovered by Indians were declared to be, in respect to boundaries, on the same footing, without any distinction, as those worked or discovered by Spaniards. Besides the other privileges secured by this ordinance to the owners of mines upon the public lands, they had the right to use the woods on mountains in the neighborhood of them, to get timber for their machines, and wood and charcoal for the reduction of the ores. Rockwell, 82, § 12, c. 13. Besides the privileges just stated, they were exempted from a strict compliance with the ordinance in respect to the registry of their mines. Indeed, every indulgence was given to them. Much care was taken to preserve for them their property in mines, and to give them the means of working them. With these rights and priv-

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ileges it is much more natural to construe the contract of the Foxes with Dubuque into a sale and a purchase of mines, than into a transfer of lands.

We will now consider Dubuque's petition to Governor Carondelet; * the reference of it to Todd for information on [* 232] the nature of the demand; Todd's reply, and the governor's final order. Dubuque makes his purchase from the Indians the foundation of his prayer for a grant, and the inducement for the governor to give it. He asks the governor to accord to him the peaceable possession of the mines and lands, which is to say, from the hills above the little River Maquanquitois as far as the hills of Musquabinenque, which forms seven leagues on the western bank of the Mississippi, by three leagues in depth. We do not doubt that Dubuque meant to ask for lands as well as mines, and that his object was to get a grant for this large body of land. But the true point here is not what he meant to ask for, but what he had a right to ask for under his contract with the Indians, and what the governor meant to grant, and could grant, under that contract. Mining was the motive which induced Dubuque to make his settlement among the Indians. It had been his pursuit and occupation for eight years before he petitioned the governor; the governor referred the petition to Andrew Todd for information on the nature of the demand. Todd replies: "I have to say that, as to the land for which he asks, nothing occurs to me why it should not be granted by your lordship, if you find it convenient, with the condition, nevertheless, that the *concessionario* shall observe the provisions of his majesty as to the trade with the Indians, and that this be absolutely prohibited to him, unless he have my consent in writing." The governor's order is granted as asked, or conceded as petitioned for, under the restrictions which the merchant, Mr. Andrew Todd, expresses in his report.

We have here, then, three things to note. First, land is described out of the contract of the Indians with Dubuque; next, that it is to be granted upon a condition; and third, that it is conceded as asked, under the restrictions expressed in the report of Todd. "Granted as asked, is the governor's order." It cannot be said that this is referable alone to the quantity of land asked for by Dubuque, and not to his statement that he had bought that quantity from the Indians, and that its boundaries were coincident with his description of them. There is no such description in the Indian sale to Dubuque. It is a misstatement of a fact. Admitting that the chiefs of the Fox Indians assented to the erection of monuments at the mouth of the Little Makoketa and at the mouth of the Tête des Morts, and that it was done to mark a boundary; when it is found that nothing was

said by them or by Dubuque at that time descriptively of a tract of land which could be surveyed, the inference is that the monuments were marks within which and from which Dubuque was [* 233] permitted to search for mines, and to * work them in the event that the mine of Peosta did not yield ore.

It cannot be presumed that the governor had not read the petition before he gave his order upon Todd's information ; or that, when giving, it was not his intention to confer upon Dubuque the benefit of his purchase from the Indians. He referred the petition to Todd for information. It was a reference out of the usual course of proceeding when applications were made for grants of land. Todd had neither agency nor office, or knowledge in such matters. The officials of the land-office were not called upon. In every other grant made by the Baron Carondelet, the applications for them were so referred. Notwithstanding the very large grants which were made by him, under all the circumstances of each case, whether pressing or otherwise, gratuitous or for a consideration, he scrupulously adhered to all the forms and the essentials which custom, usage, and the law had imposed upon the granting of lands. The cause for his reference of Dubuque's petition to Todd is obvious. We find it in the petition in this suit. Dubuque had undertaken to interfere with others who attempted to trade with the Indians. It is said that he had not permitted any one to carry on that trade on the land from the time he had made his purchase from the Indians, and that he had driven from it forcibly a person who had, without his consent, landed goods upon it with an intention to sell them to the Indians. This, it appears from Todd's report, he had no right to do. The Indian trade was regulated by ordinances from the king. Todd had obtained the privilege to carry it on, and to exclude others from doing so without his consent. From his report, it may be inferred that Dubuque had done so, its language being " that this (trade) be absolutely prohibited to him, unless he shall have my consent in writing." The governor recognizes Todd's right to give that consent. His order is granted as asked, under the restrictions expressed in the information given by the merchant, Andrew Todd. This is a very novel condition to be annexed to a grant of land in full proprietorship, if the governor meant to give such a grant. Does it not rather imply that the governor meant to permit him to continue in the quiet enjoyment of the mines, and to work them, with the use of the lands, as the Indians had permitted him to do for eight years, notwithstanding what had been Dubuque's irregular interference and appropriation of the trade with the Indians. With such a condition it was revocable by the governor upon any imputation that he had violated it. It

would not have been right to recall the order without proof of the transgression of it; but if that could be a subject of inquiry at all, it shows that though Dubuque asked for lands and mines, * that the governor had not made an unconditional grant of [* 234] lands.

It is scarcely possible that such a reference of Dubuque's petition would have been made; that the subject of Indian trade should have been introduced into the affair by Todd; and that the governor should have recognized it as a cause for qualifying the terms in which grants of lands were made; and that every official agency in making grants of land should have been disregarded, if it had been the intention of the governor to make to Dubuque a grant of the land as property, without any reference to his declaration that he had bought it from the Indians, and to the fact stated in the petition, that he was then working the mines "three leagues apart from each other."

The law for granting lands was, that the grants were to be made with formality, in the name of the king, by the governor-general of the province; that when the order to grant was given, that a surveyor should be appointed to fix the boundaries, and that the order itself should be registered in the land-office, with the memorials and other papers, whatsoever they might be, which had induced the governor to make the grant. The practice of the governors, including the Baron de Carondelet, corresponded with all of the requirements just mentioned. Nothing of the kind was done in this case. The whole proceeding was kept from the proper office in New Orleans, where, by law and usage, an entry of it should have been made. Dubuque did not ask for a survey; he took with him the papers. The first notice given of the existence of them came from Dubuque himself, after the transfer of Louisiana to the United States, when the richness of the lead mines on the upper part of the Mississippi had attracted the attention of the public and of congress. Rumors had reached the government at Washington, that Dubuque claimed the richest of them, and that speculators were trying to get from him an interest in them. At that time it became necessary to explore the upper Mississippi and its sources, with the view of obtaining general information for military and legislative purposes, and more definite knowledge of what were the boundaries of Louisiana. Lieutenant, afterwards our distinguished General Pike, was detailed, with a sufficient exploring force, for that purpose. Among other things he was charged, when he arrived at what were called the Dubuque mines, to make particular inquiries about them, and into Dubuque's claim. He had an interview with Dubuque at his residence, some

six or seven miles from the mines, but did not make an inspection of them, as Dubuque could not furnish him with transportation to their locality, and he then had been attacked with fever. He proposed however, to Dubuque, several questions in writing, and we have the paper, with the answers, signed by both of them. They are curious and reserved upon the part of Dubuque, and may find a place here without interfering with the part of the argument which we are now upon: "What is the date of your grant of the mines from the savages? Answer. The copy of the grant is in Mr. Soulard's office at St. Louis. What is the date of the confirmation by the Spaniards? The same answer as to query first. What is the extent of your grant? The copy of the grant is at Mr. Soulard's office at St. Louis. What is the extent of the mines? Twenty-eight or twenty-seven leagues long, and from one to three broad. Lead made per annum? From 20 to 40,000 pounds. The answers to the other questions are equally indefinite, and all were so excepting as to the place where the grant could be found." 1 Appendix to Pike's Expedition, 5. These answers, however, were communicated to Mr. Gallatin before the commissioners for adjusting land claims had made their report, and they serve to show that when he made his report to the President upon the Dubuque claim, that he had done so with his usual care and caution. Whatever was then in Mr. Soulard's office at St. Louis, connected with it, he had obtained. His report is not liable to the censure which was cast upon it in the argument; for if it be defective in clerical particulars, his conclusion is sustained both by knowledge and principle.

We return to the point which we left to give the extract from Pike. It was, that there were not upon Dubuque's petition any of the customary forms, or required proceedings, which had always been observed by the Spanish governors in making grants of lands. They were not only omitted by the governor, but were not asked for by Dubuque; or if he did ask, there was not a compliance with the request. The papers were kept by him without any action upon them until after the United States had acquired Louisiana.

This conduct varies so much from the ordinary action of persons under like circumstances, that it may very properly be mentioned with the other incidents of this case, which have led us to the conclusion that the governor's order was not meant to concede to him more than the quiet enjoyment and peaceable possession of the mines, and such lands as the mining ordinances permitted to be used for working them. The objection with us is, not that Dubuque had not caused a survey to be made, but that he had not obtained, that the governor had not given, an order for such purpose. We think it

could not have been done by Soulard or any other official Spanish surveyor. No one of them would have ventured to stretch a chain upon the land with a view of separating it from the public domain, without special authority to do so from the gov- [* 236] ernor. Such an order was the uniform accompaniment of a grant, and without it a concession was incomplete; though, when given, if circumstances such as were mentioned in the argument of this case interfered with its execution, it did not lessen the completeness of the title, if the description of the land was such that it could be carried into a survey. There ought not to have been in this case, any apprehension of Indian interference with a survey, after Dubuque's residence of more than eight years among them, if their understanding had been for all of that time that they had sold to him the land. His relations with them are represented to have been friendly and influential in their more important concerns; and if, as is stated, he kept all intruders from the land in its whole extent, claiming it as his property, and not permitting any one to come upon it to trade with the Indians, and keeping that trade for himself — all of this with the acquiescence of the Indians — it is not probable that fears of their opposition to it prevented him from getting an order of survey, or from having run from the monuments the three lines which would have comprehended his description of the land. It is certain that he had no order for a survey. It is equally certain, as it had not been given by Governor Carondelet, that he could not have obtained it from his successor, Gayoso de Lemos. It will not do in such cases to indulge conjecturally, as to the motives of Dubuque for such conduct, but sometimes historical facts clear up difficulties which cannot be explained in any other way. Governor Carondelet's commission had been recalled, and his successor, Gayoso, appointed, before the former had given his order upon Dubuque's petition. He was then only holding over until the arrival of his successor from Natchez. Gayoso lost no time; perhaps urged to it by very recent larger grants which his predecessor had made, and which were complained of, in announcing that, in respect to the quantity to be granted, he would enforce the regulations of O'Reilly, not only in Opelousas, Attacapa, and Natchitoches, but throughout the province. From that moment, Dubuque's claim was, at all events, if he had any rightful claim for land from his Indian contract, reduced to a league square, unless it could be shown that it had been already confirmed by Governor Carondelet; and this course was preferred in the assertion of title to it before the tribunals of the United States.

In our construction of the muniments of title of this case, we have considered them, as he does, as one instrument, and so they were

treated in the argument — that each might aid to explain [* 237] the other, and that the truth might be obtained from * the whole of them in regard to this transaction. Our conclusion is, Dubuque's contract with the Fox Indians was a sale to him of the Peosta mine, with its allowed mining appendages, with the privilege to search for other mines in the event that ore was not found in that mine; and that the order of Governor Carondelet, upon his petition, was not meant to secure to him the ownership of the lands described in his petition.

The real importance of this case, the interests involved, and the notoriety which has been given to the Dubuque claim for more than forty years, in congress and out of it, do not permit us to stop this opinion with the conclusion just announced. Hitherto, the case has been considered in connection with the documents upon which the plaintiff relies, and as if Governor Carondelet had official authority to make a grant of the land upon the petition of Dubuque. We will now present another view of it. Dubuque prays for a concession of what was then Indian land, which had been in the occupancy of the Indians during the whole time of the dominion of Spain in Louisiana, and which was not yielded by them until it was bought from them by treaties with the United States. It is a fact in the case, that the Indian title to the country had not been extinguished by Spain, and that Spain had not the right of occupancy. The Indians had the right to continue it as long as they pleased, or to sell out parts of it — the sale being made conformably to the laws of Spain, and being afterwards confirmed by the king or his representative, the governor of Louisiana. Without such conformity and confirmation, no one could, lawfully, take possession of lands under an Indian sale. We know it was frequently done, but always with the expectation that the sale would be confirmed, and that, until it was, the purchaser would have the benefit of the forbearance of the government. We are now speaking of Indian lands, such as these were, and not of those portions of land which were assigned to the Christian Indians for villages and residences, where the Indian occupancy had been abandoned by them, or where it had been yielded to the king by treaty. Such sales did not need ratification by the governor, if they were passed before the proper Spanish officer, and put upon record.

The Indians within the Spanish dominions, whether christianized or not, were considered in a state of tutelage. In the Recopilacion de las Leges de las Indias, a part of the official oath of the Spanish governors was, that they would look to the welfare, augmentation, and preservation of the Indians. Book 5, c. 2. Again: Indians, although of age, continue to enjoy the rights of minors, to avoid con-

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tracts or other sales of their property — particularly real — made without authority of the judiciary * or the intervention [* 238] of their legal protectors. Solerzanos Politica Indiana, 1 209, §§ 24, 42. Indians are considered as persons under legal disability, and their protectors stand in the light of guardians. 46, 51. The fiscal in the *audiencia* were their protectors, but in some cases they had special protectors. When Indians dispose of their landed property or other thing of value, the sale is void unless made by the intervention of the authorities, or of the protector-general, or person designated for the purpose. C. 29, 42. Many other citations of a like kind might be given from the king's ordinances for the protection of the Indians. They were protected very much by similar laws when Louisiana was a French province, excepting in this: that the power to confirm an Indian sale of land, as to the whole or a part of it, or to reject it altogether, was exercised by the French governors of the province.

Nor were these laws of protection disregarded. They were brought into operation very soon after General O'Reilly took possession of the province, in 1769. He acted not only upon Indian sales of land made after the cession of the province by France, but upon such as had been made before. Considering himself as representing the king, when called upon to relinquish the title of the crown in favor of such purchasers, he rejected them altogether when not made in compliance with the laws for the protection of the Indians, and diminished the quantities of such sales when the purchasers could show from any cause whatever that they had an equitable claim upon the Indians for remuneration. The first sale of the kind to which his attention was called was one from Rimeno, the chief of the Attacapas village, as early as 1760, to Fuselien de la Clare, afterwards claimed by Morgan and Clark. O'Reilly did not think that the sale had been completed so as to pass the title to it under the French law, though it had been executed before the governor. De la Clare then petitioned for a grant of one league to front upon the Teche, by a league in depth, making the sale to him from the Indians, of two leagues in front, from north to south, limited on the west by the River Vermilion, and on the east by the River Teche, the foundation of the equity of his claim for a grant. Governor O'Reilly received the application and granted a league in front by a league in depth. In the same manner all other larger purchases from the Indians were afterwards reduced to one league square. It became the common understanding that no larger confirmation of an Indian sale of land would be made, and no one of them was ever confirmed for more, by either of the Spanish governors of Louisiana, including Salcedo,

the last of them. This of Dubuque is the only case in which it is claimed to have been done. In Florida, larger Indian sales [* 239] * of land were confirmed, upon the ground that the governors of that province acted in such a matter upon a different authority from the king. But both in Florida and Louisiana, it was so well understood that an Indian sale of land, before it could take effect at all, needed the ratification of the governor, that it was frequently inserted in the act of sale. See claims of purchasers of Indian lands by Stephen Lynch, Joseph and John Lyon. Such had been the law of Louisiana, or rather the administration of it by the governors, for more than eighteen years, when Dubuque alleges that he bought the land from the Fox Indians. Such it had been for twenty-six years when he presented his petition to the Baron Carondelet. It is true that the governors had the same powers to grant the public lands of the crown, to which a title and instant possession could be given to the grantee ; but it is also true, in their action upon the sales of Indian lands still in their occupancy, that they were bound by the same laws, usages, and customs, and by those laws especially which had been made for the protection of the Indians, and by the oath which they took to look to the welfare, augmentation, and preservation of the Indians.

Such are our views of the law relating to the powers of the governor in respect to sales of land by the Indians. If we thought then, as we do not, that the order of Governor Carondelet upon the petition of Dubuque was a grant of the ownership of the land, we should be obliged to decide that it was an unaccountable and capricious exercise of official power, contrary to the uniform usage of his predecessors in respect to the sales of Indian lands, and that it could give no property to the grantee. It is not meant, by what has just been said, that the Spanish governors could not relinquish the interest or title of the crown in Indian lands and for more than a mile square ; but when that was done, the grants were made subject to the rights of Indian occupancy. They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it.

It has been intimated that the action of the governors of Louisiana upon the sales of Indian lands, especially in the reduction of them to a league square, was the consequence of O'Reilly's regulation, limiting grants of land in particular districts to a league square. This may have been so as regards quantity, but the principle upon which they acted upon Indian sales of land is to be found in those laws of Spain which made them officially the protectors of the Indians.

But it will be said at this point of the case, as it was said in the argument, if the governor's order was not a grant for lands, that *it gives to Dubuque nothing, as he had already the [* 240] occupancy under the Indian purchase. The error in the statement is, the assertion that he had the right to occupancy, and in the supposition that the opposers of the grant contend that the governor meant to give him that right. Not so. The last, we have just said, the governor could not give, and that the Indian sale could not give it to a purchaser until the sale had been ratified. But the privilege to work the mines in lands still in the occupancy of the Indians, he could give, because the mines were a part of the royal patrimony of the crown, and the king had directed that they might be searched for and worked in all of his dominions by his subjects, both Spaniards and Indians. When, then, Dubuque represented to him that he had bought mines and lands from the Fox Indians, and asked for the enjoyment and peaceable possession of them, and the governor wrote "granted as asked for," he meant no more than this: as you say that you have bought the mines, with the permission of the Indians to work them, you shall also have mine.

The view taken of this case relieves us from the consideration of several points which were made in the argument of it; particularly from that of the effect of the words "peaceable possession," found in the petition of Dubuque to Governor Carondelet, to which it was contended his final order had a direct reference. We admit, with pleasure, that it was shown by a learned and discriminating appreciation of those words in grants for land that they were more frequently than otherwise a grant of ownership; but they cannot do so in a case where the order or grant is given with direct reference to a fact in the petition for it which does not exist, or where a grant is given upon an Indian sale of land contrary to what we think the laws of Spain permitted to be done. The order given upon the petition of Dubuque, had it been intended to be a grant of ownership, would not have been binding upon the conscience of the king of Spain, and only such as are so are conclusive against the United States under the treaty transferring Louisiana.

Nor is it necessary for us to notice the reference which was made in the argument to the treaty¹ made by General Harrison with the Fox Indians, further than to state that it is no more than a declaration that the Indians, in selling to the United States their land, did not mean to sell parts of it which they had sold before to others. It may have had a reference to this claim of Dubuque, but not having been so expressed, it cannot be inferred.

¹ 7 Stats. at Large, 84.

We cannot leave this case without a reflection occurring from our investigation of it, and which is not favorable to the statement made by Dubuque, that he had bought the land from the Fox Indians.

[* 241] * Dubuque's mines, as they were called, are on the west bank of the Mississippi, a little more or less than seventy miles below Prairie du Chien, where he made his contract with the Indians. They are so near to the city of Dubuque that they may be said to be contiguous. In the year 1780, the wife of Peosta, a warrior of the Kettle chief's village, discovered a lead mine on these lands, and other mines were found soon afterwards. The principal mines are situated upon a tract of one league square, immediately at the Fox village of the Kettle chief, extending westward. This was the seat of the mining operations of Dubuque. The Kettle chief's village was on the bank of the Mississippi River, below the little River Makoketa, and was at the time when Dubuque settled there, a village of many lodges. Schoolcraft.

If it was not the largest of the Fox or Outagami Indians, it was not inferior to any other village than that of the Foxes and Sacs on the bank of the Mississippi River, near Rock Island. It had been for a long time an Indian village when Dubuque settled there. It continued as such all the time that Dubuque resided there until his death; that is, from 1788 to 1810; and its chief survived Dubuque for ten years. Can it be presumed that under the contract with Dubuque, the Indians meant to sell him that village, and all the lands for miles above and below it, with all of the mines upon the land directly adjoining it? And yet such must be the result if that were so; for, carry Dubuque's description of his purchase into a survey, and it takes in the Kettle chief's village. We cannot believe that the Indians did make such a sale, or that they were so ignorant of their topography as not to know that a line extended from the monuments on the Makoketa and the Tête des Morts for three leagues west, with a base equal to the Mississippi boundary, would not have included their village. We make no other commentary than this — that time, if it does not obliterate the offences and weaknesses of men, disposes us to recollect them in connection with their merits; and if we speak of them at all, to do so forbearingly.

We will now close the case with an additional remark. This claim was presented to congress in the year 1812. It had been before the commissioners for adjusting land claims in the territory of Louisiana, as early as 1806. It has been repeatedly before both houses of congress, but with such differing opinions concerning it, that no confirmation of it could be obtained, although the commissioners had returned

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it as a valid claim. It was before the senate again in 1845. It was then reported upon, and again in 1846. Doc. March 30, 1846. That is an able paper; but besides conclusions drawn from the decisions * of this court which we do not think applicable, [* 242] and others which were made without reference to the laws of Spain, which prevailed in Louisiana, we think it remarkable that the report, though containing frequent allusions to Dubuque's contract with the Indians, and extracts from it, does not set it out entire as one of the papers upon which the claim was rested. The petition of Dubuque to the governor, his reference of it to Todd, Todd's reply, and the governor's order, are the papers upon which the report was made. The same documents were placed before the commissioners in 1806, without the Indian contract. See Public Lands, American State Papers, vol. 3, p. 580. It does not surprise us that a correct view was not taken of it then, or that the committee of public land claims in the senate should have viewed it differently in 1846 from that now taken by this court. The petitioner in this suit has the merit of having put his case upon every thing in any way connected with the claim of Dubuque fairly, fully, and openly. Still, if success does not follow his expectation, he cannot complain of it, for the purchase from Dubuque was an adventure to buy the half of the land with a full knowledge of all of the papers and the circumstances under which Dubuque claimed.

The judgment of the district court is affirmed.

AUGUSTINE ANNE LOUISE DENISE, HYACINTH ADDA MAYNEAUD DE PAUCEMONT, COUNTESS DE TOURNON, SERAPHINE CARPENTIER, WIDOW OF OLIVIER LOUIS MARTIN, CHARLES ALEXANDER MARTIN, JANE MARARIE SERAPHINA MARTIN, and JACQUES FRANCOIS, JUSTINIAN FRANCOIS, and ANTOINE JOSEPH SERVAIS, Plaintiffs in Error, v. BENJAMIN RUGGLES.

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A grant made by the French authorities in Louisiana in 1722, unaided by a survey, and the calls in which were too vague and indeterminate to separate any particular tract of land from the public domain, will not support an action of ejectment.

* THE case is stated in the opinion of the court. [* 243]

Garland and Johnson, for the plaintiffs in error.

Bibb and Cushing, (attorney-general,) *contra*.

CATRON, J., delivered the opinion of the court.

This suit was brought in 1844, in the circuit court for the Missouri district, to recover sections nine and ten, and the half of sections numbers fifteen and sixteen, adjoining to nine and ten, in township thirty-eight north, range two east of the principal meridian ; making 1,920 acres, of which it is alleged the defendant Ruggles was in possession. The cause was tried before a jury in 1851, and a verdict rendered for the defendant.

The object of the suit is to establish a claim of Renault's heirs to a tract of land containing upwards of fifty thousand acres. The claim depends on a grant, a translation of which, from the French, was given in evidence in the circuit court, and is as follows :—

“ In the year one thousand seven hundred and twenty-three, and on the fourteenth of June, granted to Mr. Renault, in freehold, for the purpose of forming his establishment on the mines.

“ One league and a half of ground fronting on the Little Maramecq on the River Maramecq, at the place of the first arm, (branch, or fork,) which leads to the collection of cabins called the Cabanage de la Renaudiere, by six leagues (eighteen miles) in depth ; the river forming the middle of the point of compass, and the streamlet being perpendicular, as far as where Mr. Renault has his furnace ; and thence straight to the place called the Great Mine.”

A copy of the original, in French, being in the record also, it is here insisted for the plaintiffs, that the foregoing translation is erroneous, and does not truly describe the boundaries of the land granted ; that it should be one and a half leagues fronting on the Little Maramecq in the River Maramecq, at the place of the first branch which leads to the collection of cabins, called the Cabanage de la [* 244] Renaudiere, by six leagues in depth, “ the * river forming the middle of the Rhumb line, and the lead stream, as far as where Mr. Renault has his furnace, and thence a direct line to the spot named the “ Great Mine.”

The fork of Little Maramecq called for, and the old furnace on it, were proved to exist on the trial, by Mr. Cozzens, who was sent to survey the grant, by order of court, at the instance of the plaintiffs. He says, the Grand Mine is marked on the map ; that is, on a copy of the map of public surveys of the United States, obtained from the land-office at St. Louis. He furnished no plot, because, as he reported and deposed, he could not make a survey of the land claimed ; the description in the grant being too vague and unmeaning for him to lay down the land corresponding to the objects called for on the ground. He further deposed, that he understood the French, and was governed by both the English and French copies. On the question whether the tract of land claimed could be ascertained, and

the true boundaries identified by survey, the jury was instructed as follows:—

“The court is of opinion that the grant to Renault, unaided by a survey under the French or Spanish government, did not separate the land from the public domain: That it cannot now, from its uncertainty, be located; it is not therefore a grant for any specific lands, and does not entitle the plaintiffs to the *locus in quo*.”

Thus the circuit court held, that notwithstanding the Little Maramecq River, the lead stream, the smelting furnace, and the Grand Mine, existed as indicated on the public surveys, and as claimed to exist by the plaintiffs, still, the grant was void for uncertainty, and the impossibility of locating the same.

As the first instruction took the case from the jury, and put an end to the suit on legal grounds, we will proceed to examine this instruction.

The land is to front on the river. When the point of beginning is established on the river, then it is to be meandered up or down, until a straight line will reach a league and a half from the first to the second corner.

It is insisted that the mouth of the streamlet is to be the place of beginning, and that the first line is to run up the river; and that the northwestern side line is to meander the streamlet to the old furnace, called for in the grant.

Why the beginning point should be at the mouth of the lead stream, it is difficult to comprehend. The grant was intended to cover Renault's mining establishment; but if surveyed, as contended for, the second line would run through the centre of his smelting furnace, and also through the centre of the mine where the ore was obtained. By such construction, * the main object of the [* 245] grant, when it was made, would have been defeated. We suppose the following would be a more plausible construction: Take the streamlet, from its mouth to the furnace, to be the perpendicular of the front line on the river; then draw a straight line from its mouth to the furnace to give the course of the side lines; they being drawn parallel on each side of the foregoing middle line and a league and a half apart. By such survey the smelting furnace would have been included. But where these side lines were to begin or end, (treating each as a unit,) no one could tell; nor was it possible to reach the Grand Mine, or include it, by this mode of survey, and therefore this construction could not be relied on.

The jury was bound to find the lines of the grant from its calls, and the objects proved to exist on the ground corresponding to the calls. Nor could this be done by conjecture; lines and corners must be established by the finding, so as to close the survey.

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If, after admitting all the verbal evidence to be true, as to objects on the ground, to the extent insisted on for the plaintiffs, and disregarding the defendant's evidence, it was still plainly impossible to locate the grant by its words of description; then, the instruction given by the circuit court was proper.

The argument assumes that the second corner is four and a half miles above the mouth of the lead stream on the Maramecq, and the beginning corner at the mouth of the streamlet; that this is the front; that the northwestern side line meanders the lead stream to the furnace; and then runs straight through the Great Mine, extending to a point beyond eighteen miles in depth from the mouth of the streamlet; that, from this last point, a line must be drawn four and a half miles long, and corresponding in its course to the front line on the river; and, from the termination of this line, one must be drawn to close on the upper corner on the river. This is the theory of a survey predicated of the translation relied on in this court. No mode of survey is here claimed, as being indicated by the translation furnished to the circuit court, and on which the instruction is founded.

As the court below was influenced, in its construction of the grant, by the objects claimed by the plaintiffs, and admitted to exist on the ground, so this court must look to the same source of information for aid, in coming to a practical result. Renault's furnace is not found on the map presented to us, but the Great Mine is. We must assume, however, for the purposes of this action, that the furnace lies

so high upon the Mineral Fork as that a straight line run [* 246] from it to the Great Mine, would include * the land sued for.

A survey, made on this assumption, would require a line so acute to the Mineral Fork, as to strike the Little Maramecq River not far above the upper corner on the river, and give the grant the form of a triangle. Place the furnace on any part of the Mineral Fork where probable conjecture can locate it, and still the second line, as here claimed, (running through the furnace, and the Great Mine,) would have an acute angle in it, so that no depth could be obtained by this mode of survey. Nor could a corresponding line to the front on the river be obtained; nor a line be laid down corresponding to the northwestern side line; as this hypothetical line would vary so much in its courses as not to afford space for the two other lines. We can say, with entire confidence, that no such theory of survey can be carried out, taking the objects called for and found as the governing rule; and it is equally certain, in our opinion, that no specific boundaries were contemplated as having been given to Renault's grant when it was made, but that the lines were to be afterwards established by survey, as in cases of Spanish concessions covering

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improvements where the exterior boundaries were left to the discretion of the surveyor.

We are, therefore, of opinion, that the circuit court properly held that the grant did not separate any specific tract of land from the public domain, and that the jury could not locate it.

The court having held that the plaintiffs had no title to support their action, it was useless to give any further instructions; nor does it matter whether those given in addition to the first one were right or wrong.

We, therefore, order that the judgment be affirmed.

CORNELIUS D. THORP, Plaintiff in Error, v. ARDEL B. RAYMOND.

16 H. 247.

The saving clause in the New York act, limiting writs of right, does not allow for cumulative disabilities.

THE case is stated in the opinion of the court.

Lawrence, for the plaintiff in error.

Shell, contra.

* NELSON, J., delivered the opinion of the court. [* 248]

This is a writ of error to the circuit court of the United States for the southern district of New York.

The plaintiff brought an action of ejectment in the court below against the defendant, to recover the one-twentieth part of a mill seat and the erections thereon, together with some eighteen acres of land, situate on the River Bronx in the town and county of Westchester in said State; and, on the trial, gave evidence tending to prove that the premises were owned in fee in 1726, by one Nicholas Brouwer, and that he continued seised of the same as owner down to his death, in 1749; that his heir at law was a grandchild, Hannah, then the wife of * Edmund Turner; that said Turner died [* 249] in 1805, leaving his wife surviving, but who had been for some years previously and then was insane, and so continued till her death, in 1822; that at her death she left, as heirs at law surviving her, several children and grandchildren; that one of her surviving children was Jemima Thorp, the mother of the present plaintiff, who was married to Peter Thorp when nineteen years of age: the said Peter died in 1832, and said Jemima, who survived him, died in 1842, leaving the plaintiff and other children surviving. The plaintiff, also, proved the defendant in possession of the premises, and rested.

The defendant then proved that, before the year 1801, the premises in question were in the actual possession of one Oliver De Lancy, claiming as owner, who, in the same year, by indenture of lease, demised the same to one James Bathgate, for the term of fourteen years; that the said Bathgate entered into possession, and continued to hold and occupy the premises under this lease till 1804, when one David Lydig entered, claiming to be the owner in fee; that said Bathgate attorneyed to, and held and occupied under him, as tenant, down to 1840, when the defendant succeeded as tenant of the premises under the said Lydig; that David Lydig died in 1840, leaving Philip, his only child and heir at law, surviving; and that from the date of the lease to Bathgate, 1st May, 1801, down to the commencement of this suit, the premises had been continually held and possessed by De Lancy and the Lydigs, father and son, by their several tenants, claiming to be the owners in fee, and exclusive of any other right or title; and occupied and enjoyed the same in all respects as such owners.

Both parties having rested, the court charged the jury that Hannah Turner took the title to the premises on the death of her grandfather, Nicholas Brouwer, in 1749, as his heir at law; but that, as she was then a *feme covert*, the statute of limitations did not begin to run against her till 1805, on the death of Edmund Turner, her husband; and as she was also under the disability of insanity, in 1801, when the adverse possession commenced, the statute did not begin to run against her estate until her death, this latter disability having continued till then; and that her heirs had ten years after this period to bring the action. But, that the right of entry would be barred if the adverse possession, including these ten years, had continued twenty years; and the right of title would also be barred if the adverse possession had continued twenty-five years, including these ten years. That the ten years having expired in 1832, and the action not having been brought by the plaintiff till 1850, it was barred by the [* 250] statute of limitations in both respects as *an ejectment, or writ of right; and that, upon the law of the case, the defendant was entitled to their verdict.

We think the ruling of the court below was right, and that the judgment should be affirmed.

It is admitted, that, if this suit should be regarded in the light of an action of ejectment to recover possession of the premises, the right of entry would have been barred by the statute of New York, the twenty years bar having elapsed since the right accrued, before suit brought. 1 R. Laws of 1813, p. 185, § 3.

The right of entry of Hannah Turner accrued in 1801, but at that

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time she was laboring under the disability of coverture, and also of insanity, which latter survived the former, and continued till her death, in 1822. By the saving clause in the third section of the act, the heirs had ten years from the time of her death within which to bring the ejectment, and no longer, notwithstanding they may have been minors, or were laboring under other disabilities, as it is admitted successive or cumulative disabilities are not allowable under this section. 6 Cow. 74; 3 Johns. Ch. R. 129, 135. The ten years expired in 1832, which, with the time that had elapsed after the adverse possession commenced, exceeded the twenty years given by the statute. The suit was brought in 1850.

But, it is supposed that the saving clause in the second section of this act, which prescribes a limitation of twenty-five years as a bar to a writ of right, is different, and allows cumulative disabilities; and as ejectment is a substituted remedy in the court below for the writ of right, it is claimed the defendant is bound to make out an adverse possession of twenty-five years, deducting successive or cumulative disabilities. This, however, is a mistake. The saving clause in this second section, though somewhat different in phraseology, has received the same construction in the courts of New York as that given to the third section. 12 Wend. 602, 619, 620, 635, 636, 656, 676.

The judgment of the court below is, therefore, affirmed.

THIRION MAILLARD, EARNEST CAYLERS, and HAMILLE C. ROUMAGE,
Plaintiffs in Error, v. CORNELIUS W. LAWRENCE.

16 H. 251.

Under the tariff act of 1846, (9 Stats. at Large, 42,) shawls of worsted, worsted and cotton, silk and worsted, silk, barege, merino, mousseline de laine, and worsted and silk scarfs, are wearing apparel, and subject to a duty of thirty per centum *ad valorem* under schedule C.

ERROR to the circuit court of the United States for the southern district of New York. The case is stated in the opinion of the court.

McCulloch and *Cutting*, for the plaintiffs.

Cushing, (attorney-general,) *contra*.

* DANIEL, J., delivered the opinion of the court. [* 256]

The plaintiffs in error instituted in the court aforesaid against the defendant an action of trespass on the case for the re-

covery of an alleged excess of duties charged by the defendant as collector of the port of New York, and paid to him under protest by the plaintiffs upon certain goods imported by them from Havre in France, and described by them in the invoices and entries thereof as "worsted shawls, worsted and cotton shawls, silk and worsted shawls, barege shawls, merino shawls, silk shawls, worsted scarfs, silk scarfs, and mousseline de laine shawls." There appear to have been nineteen different importations by the plaintiffs, comprised within the description just given, but a particular or separate enumeration of them is not necessary, it being admitted that the protest of the plaintiffs embraced the whole of them, and that the correctness or incorrectness of the proceeding in reference to each of them depends upon the construction of the same statute. Upon the articles thus de-

scribed, the collector charged the duty of thirty per centum [* 257] *ad valorem* as being wearing apparel within the meaning of schedule C, in the act of congress of the 30th of July, 1846

Vide 9 Stats. at Large, c. 74, p. 44. The plaintiffs insist that according to schedule D, in the same statute, they were bound to pay at the rate of twenty-five per centum *ad valorem* only, and for a recovery of the difference between this last rate and that at which they have made payment, their action has been brought.

Upon issue joined on the plea of *non-assumpsit* and under instructions from the court as to the import of the provisions of the statute of July 30, 1846, a verdict was found for the defendant, and a judgment entered in accordance therewith. This case is comprehended within narrow limits, and its decision must depend entirely upon the interpretation of those portions of the statute of 1846, designated as schedules C and D, as to the description and enumeration of the articles subjected to duties and the rate of impost prescribed by these schedules.

In schedule C, which imposes a duty of thirty per centum *ad valorem*, are comprised the following articles, in the literal terms of the law, "clothing ready-made, and wearing apparel of every description, of whatever material composed, made up, or manufactured, wholly or in part by the tailor, seamstress, or manufacturer."

By schedule D, of the same act, it is declared that an impost of twenty-five per centum only shall be levied on "manufactures of silk, or of which silk shall be a component material, not otherwise provided for; manufactures of worsted, or of which worsted is a component material, not otherwise provided for."

Several witnesses were examined by the plaintiffs, with the view of showing that in a mercantile sense the term shawls, under which descriptive name the goods of the plaintiffs were entered, did not in-

clude "wearing apparel," and *à fortiori* not wearing apparel either made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, and that therefore, under the provision of schedule D, they were subject to an impost of twenty-five per centum only as manufactures of silk or worsted, "not otherwise provided for." Countervailing evidence was adduced on the part of the defendant to show that, in a mercantile sense, and by generally received and notorious acceptation, and by the plain and even imperative language of the statute, shawls were established to be wearing apparel; and consequently came within the rates imposed by schedule C, and could not be brought within the description in schedule D, as articles "not otherwise provided for." The character of the evidence, or more properly the points it was designed to bear upon, most plainly appear from the several prayers submitted at the trial, and by the rulings of the court upon those prayers.

* The counsel for the plaintiffs moved the court to charge [* 258] and instruct the jury, 1st. That if the jury shall find from the evidence that the shawls in question were known at the date of the passage of the said act of 30th July, 1846, in trade and commerce as "manufactures of worsted," or of which worsted was a component material, that then they are embraced in schedule D, and are only liable to a duty of twenty-five per centum *ad valorem*, and no more.

Second. That if the jury shall find from the evidence that the shawls in question were not, at the date of the said last-mentioned act, in a commercial sense, and according to the meaning of the term among merchants, either —

1. Articles worn by men, women, or children "made up," or made wholly or in part by hand. 2. Nor clothing ready-made, or wearing apparel "made up," or manufactured wholly or in part by the tailor, seamstress, or manufacturer. 3. Nor manufactures of cotton, linen, silk, wool, or worsted, embroidered or tamboured in the loom, or otherwise by machinery, or with the needle, or other process; then, in either of said cases, the articles in question are liable only to a duty of twenty-five per centum *ad valorem*.

Third. That if the jury shall find from the evidence that the articles in question were charged, under the act of 1842,¹ with duty as "manufactures of combed wool or worsted," "manufactures of worsted, and manufactures of worsted and silk combined," under section 1, subdivision 1, of said act, and as "manufactures of cotton, or of which cotton shall be a component part, under section 2, subdivision 2, of said act, then the articles in question are, under the act of 1846, liable to a duty of twenty-five per cent. *ad valorem*, and no more

Fourth. That if the jury shall find from the evidence that, at the

¹ 5 Stats. at Large, 548.

date of the passage of the said act of the 30th of July, 1846, the shawls in question were commercially known as "manufactures of worsted," or of which worsted was a component material, and that they were not known in trade and commerce as clothing ready-made, or as "wearing apparel" made up, or manufactured wholly or in part by the tailor, seamstress, or manufacturer, nor as articles worn by men, women, and children, made up, or made wholly or in part by hand, then they are chargeable with a duty of twenty-five per cent. *ad valorem*, and no more.

Whereupon his honor, the presiding judge, refused so to instruct the jury in accordance with all or any of the said several prayers, whereby the plaintiffs, by their counsel, had prayed the court to instruct the jury.

And thereupon the counsel for the plaintiffs then and [*259] there *excepted to the refusal of the said judge to instruct the jury in conformity with the said several prayers of the said plaintiffs, and also to the charge and instructing the jury by the said judge, in conformity with all, any, and every of the several prayers wherein the defendant's counsel had so prayed the court to instruct the jury as matter of law.

The counsel for the defendant insisted, as matter of law, and prayed the court to charge and instruct the jury as follows:—

First. That shawls and scarfs suitable and adapted in the state they are imported, to be worn by women on the person, as an article of dress, and usually so worn by women in the United States, are "wearing apparel," "made up" or manufactured wholly or in part, by the tailor, seamstress, or manufacturer, within the true meaning of schedule C, of the tariff act of the 30th of July, 1846, and are properly chargeable with the duty of thirty per centum *ad valorem*, prescribed by said schedule C.

Second. That shawls and scarfs of the description above named, are not the less wearing apparel, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, within the true meaning of the said schedule, though sometimes purchased by clothiers and tailors to be made up into vests, dressing-gowns, and other garments, as testified to by the witnesses for the plaintiffs in this case.

Third. That shawls and scarfs of the description above named are wearing apparel, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, within the true meaning of the said schedule C, notwithstanding, at the date of the passage of the said act of July, 1846, they may not have been called or known by commercial men in trade and commerce by the name of wearing apparel.

Fourth. That whatever may have been, at the date of the said act, the definition given by commercial men to the term "wearing apparel," shawls and scarfs of the description above named are nevertheless wearing apparel, made up in whole or in part by the tailor, seamstress, or manufacturer, within the true meaning of the said schedule C.

Fifth. That shawls or scarfs suitable and adapted in their state as imported, to be worn by women and children, of whatever material composed, having fringes added by hand to the body of the shawls after the same has come from the loom, with sticks or needles, or other such implements, although according to commercial usage and understanding that said articles are not thereby charged in their commercial sense or acceptation, are articles worn by women and children made up or made wholly or in part by hand within the true meaning of the said schedule C, and are therefore chargeable with the duty of thirty per centum *ad valorem*, prescribed by said schedule C.

Sixth. That shawls and scarfs of the description above [* 260] named, in the fringes of which, after the body of the shawls has come from the loom, knots are made by hand as a part of such fringes, or the fringes of which are twisted or otherwise completed by hand, although according to commercial usage and understanding the said articles are not hereby changed in their commercial sense or acceptation, are, nevertheless, articles worn by women and children, made up or made wholly or in part by hand, within the true meaning of the said schedule C, and are therefore chargeable with the duty of thirty per centum *ad valorem*, prescribed by the said schedule C.

And thereupon his honor, the presiding judge, charged the jury in accordance with the several prayers in conformity with which the defendant's counsel had insisted as matter of law.

And thereupon the counsel for the plaintiffs excepted to said ruling of the court upon each of the said prayers.

In construing the provision of schedule C, we think that its meaning cannot be easily misconceived, if the rule of interpretation be drawn from the ordinary and received acceptation of its language, or from any regard to the sensible and consistent application of its words. It is obvious, that by the phrase "clothing ready-made, and wearing apparel of every description," the legislature did not mean to limit the enumeration to such habiliments as were either by necessity or by a regard to comfort or utility required to be changed from their original shape or fashion, and reshaped and reconstructed in order to adapt them to the human body, or to the purposes of life. Such a construction would render the member of the sentence immediately following and connected with the former by the copulative conjunction, and de-

signing to introduce a new class of subjects, altogether absurd, and wholly inoperative. It must be understood as being the intention of the legislature to add to "clothing ready-made," in the acceptation above given, every article which in its design and completion and received uses, is an article of wearing apparel, and to comprise such article within schedule C of the act of 1846, no matter of what material composed, either in whole or in part, or by whom composed or made up, whether by the tailor, seamstress, or manufacturer. The question to be determined has no relation either to material, or process, or agent, but exclusively to the origin and purposes of the subject of the duty imposed as being in its design and in its finished condition "wearing apparel." Simply, in other words, whether shawls are wearing apparel.

By the several prayers pressed upon the circuit court for instructions to the jury, the object to which they are all directed has been the diversion of the jury from this the only legitimate
*261] *inquiry before them. The effort has been to substitute for the literal and lexicographical and popular meaning of the phrase "wearing apparel," some supposed mercantile or commercial signification of these words, and to render subservient to that signification what was clearly accordant with the etymology of the language of the statute, with the essential purposes and action of the government, and with the wide-spread, if not the universal understanding, of all who may not happen to fall within the range of a limited and interested class. In instances in which words or phrases are novel or obscure, as in terms or art, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. Perhaps within the compass of the English language, and certainly within the popular comprehension of the inhabitants of this country, there can scarcely be found terms, the import of which is better understood than is that of the words "shawl" and "wearing apparel," or of "shawl" as a familiar, every day and indispensable part of wearing apparel. And it would seem to be a most extravagant supposition which could hold that, in the enactment of a law affecting the interests of the nation at large, the legislature should select for that purpose language by which the nation, or the mass of the people, must necessarily be misled. The

popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. If, therefore, the strange concession were admissible, that, in the opinion of a portion of the mercantile men, shawls were not considered wearing apparel, it would still remain to be proved that this opinion was sustained by the judgment of the community generally, or that the legislature designed a departure from the natural and popular acceptation of language.

Another position pressed upon the circuit court in behalf of the plaintiffs in error, as is shown by the evidence and by one of the prayers of the court, was this: that shawls, in the [* 262] form in which they are fashioned and finished by the manufacturer, could not properly be termed wearing apparel, because they are by tailors and clothiers frequently purchased to be worked up into vests and other garments. This position might, with equal propriety, be urged with reference to any article of wearing apparel whatsoever which should be diverted from its primal and regular use and design. The consistency and force of this argument, if such it deserves to be called, may be aptly illustrated by the account of the varied uses of a familiar article of wearing apparel found in a poetical description of the privations and expedients of a needy author, in which we read that,

“ A stocking decked his brow instead of bay,
A cap by night, a stocking all the day.”

According to the logic of the position last referred to, a stocking transferred into a night-cap is shown never to have been a stocking, and therefore never wearing apparel, notwithstanding its primitive denomination, the design for which it was knit or woven, or the offices to which it may have been usually applied.

To the rulings of the circuit court upon the prayers presented on behalf of the plaintiffs and defendants respectively, we deem it unnecessary to apply a separate comment. It is sufficient here to remark, that upon a deliberate examination of those rulings, in reference to the facts and features of the case, we accord to the former our entire sanction, as being coincident with the principles

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laid down in this opinion, and with a just interpretation of those clauses of the statute under color of which this action was instituted. We therefore adjudge that the decision of the circuit court be, and same is hereby affirmed.

EDWIN BARTLETT, Plaintiff in Error, v. GEORGE P. KANE.

16 H. 263.

Under the sixteenth and seventeenth sections of the tariff act of 1842, (5 Stats. at Large, 563-4,) the power of the government appraisers was not terminated by returning an appraisement to the collector; when they found it was questioned, they had a right to reconsider it, and for this purpose to call on the importer to produce his correspondence, and he could not, by taking an appeal, exempt himself from the duty of producing it.

The decision of the government appraisers is final, if not appealed from; or if an appeal, having been taken, is waived.

Additional duties, by way of penalty, levied under the eighth section of the tariff act of 1846, (9 Stats. at Large, 43,) do not make part of the drawback, to be returned on exportation.

ERROR, to the circuit court of the United States for the district of Maryland. It was an action brought by Bartlett against Kane, who was the collector of the port of Baltimore, for the refunding of certain duties alleged to be illegally exacted upon the importation of Peruvian bark. The case is stated in the opinion of the court.

Brune and Brown, for the plaintiff.

Cushing, (attorney-general,) *contra*.

[*269] * CAMPBELL, J., delivered the opinion of the court.

This suit was commenced by the plaintiff as consignee of six hundred and fourteen seroons of Peruvian bark imported into the port of Baltimore, and entered at the custom-house, for an excess of duties charged by the defendant as collector, and paid under protest. Two hundred seroons of the first quality were entered for consumption, and the remainder for warehousing. On the 4th of October, 1849, the appraisers of the custom-house reported the value of the invoice to be ten per cent., and more, above the value declared by the agents of the plaintiff who made the entry, and in consequence the collector, besides the legal duty of fifteen per cent. *ad valorem*, assessed an additional duty of twenty per cent. under the eighth section of the act of 1846, (9 Stats. at Large, 43, c. 74,) for undervaluation. On the 6th of October, 1849, the plaintiff duly protested against the appraisement, and requested that the case might be submitted to merchant appraisers, as provided by law.

After notice of the appeal, the same day, the permanent appraisers required the plaintiff "to produce all their correspondence, letters, and accounts, relative to the shipment, and to make a deposition that the documents furnished were all that he had concerning the shipment."

In reply to this, some five days after, the plaintiff instructed his agents that it would be tedious and difficult to comply with the requisition, in consequence of the volume of the correspondence, says he cannot understand what use the appraisers could make of them, as they had made their report; that he should defer their presentation for another tribunal, and that he withdraws his appeal, and will pay the duties under protest. He still insists upon the overvaluation, but offers to settle at that rate, provided the additional duty is not charged. He says that this exaction is illegal, and they can test it at their leisure. That he had been advised that an appeal appraisement might interfere with his rights in a court of justice.

These letters of the plaintiff were submitted to the permanent appraisers, who replied, they could make no alteration of their estimate, and the appeal of the plaintiff was withdrawn. The plaintiff paid the entire duties exacted upon the appraised value of the entire import, including those entered for consumption as well as warehousing, and an additional duty of twenty [* 270] per cent. for undervaluation. These sums were paid under protest. A portion of the bark was exported, and upon this the plaintiff became entitled to drawback, which was paid to the extent of the regular duty, but the additional duty was not refunded.

The complaint of the plaintiff is, that the appraisers, instead of estimating the value of the Peruvian bark, according to the cost price in the markets of its production, under the directions of the secretary of the treasury, caused a chemical analysis of samples to be made to ascertain the quantity of sulphate of quinine it contained, and, having ascertained its relative intrinsic value with other imports of the same article, regulated its appraised value by a comparison with the cost of such imports. The facts and the complaint were submitted to the secretary of the treasury, who replied as follows : —

"It appears from the report of the United States appraisers, dated 20th October last, that the dutiable value of the article in question having been estimated and sustained by them in conformity with law, it was found that the appraised value exceeded, by ten per cent. or more, the value declared in the entry, and that an appeal from

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this appraisement, entered by the importer, was subsequently withdrawn by him. Under these circumstances, it necessarily follows that the original appraisement, made by the United States appraisers, is to be taken as final and conclusive in determining the dutiable value, and that such value, exceeding by ten per cent. or more, the value declared in the invoice and entry, the 'additional duty' of twenty per cent., as provided in the eighth section of the tariff act of 1846, is chargeable under the law, in addition to the regular tariff rate of fifteen per cent. *ad valorem*, levied on the enhanced value of the article in question. A supplemental question in reference to this importation having been submitted to the department, under date of 7th instant, namely, whether the importer is not entitled to the return of that portion of the 'additional duty' paid on that part of the importation withdrawn from warehouse by the importer, and exported from the United States, I have to advise you that, upon a careful examination of the subject, it is the opinion of the department that the 'additional duty' imposed in all cases of undervaluation, to a certain extent, was intended, and must be considered as entirely distinct in character and object from the regular tariff rates of duty exclusively in view when the laws regulating the drawback of duties were enacted; and that, consequently, no return of such 'additional duty,' could be legally made as debenture. It is thought proper to add, that the practice heretofore pursued under the instructions of the department has been uniformly governed by these views."

[* 271] * Much evidence was given at the trial to prove that the value declared by the agents of the consignee at the time of the entry was strictly accurate, and that the rule of valuation adopted at the custom-house was deceptive, and injurious to the importer.

The conclusions of the secretary of the treasury, as before set forth, were sustained in the circuit court, and form the subject for examination in this court.

By the sixteenth section of the tariff act of 1842, 5 Stats. at Large, 563, c. 270, it is prescribed to the appraisers, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value, and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the said goods, wares, and merchandise, at the time purchased, and in the principal markets of the country wherever the same shall have been imported into the United States, with the proviso, that whenever the same shall have been imported into the United States from a country in which the same have not been manufactured and produced, the

foreign value shall be appraised and estimated according to the current market value, or wholesale price of similar articles at the principal markets of the country of production or manufacture at the period of the exportation of said merchandise to the United States. The seventeenth section of the act authorizes the appraisers to call before them, and examine upon oath the owner, importer, consignee, or other person, "touching any matter or thing which they may deem material in ascertaining the true market value, or wholesale price of any merchandise imported, and to require the production on oath to the collector, or to any permanent appraiser of any letters, accounts, or invoices in his possession relating to the same, for which purpose they are hereby respectively authorized to administer oaths and affirmations; and if any person so called shall neglect or refuse to attend, or shall decline to answer, or shall, if required, refuse to answer in writing any interrogatories, or produce such papers, he shall forfeit and pay to the United States the sum of one hundred dollars; and if such person be the owner, importer, or consignee, the appraisement which the said appraisers may make of the goods, wares, and merchandise, shall be final and conclusive, any act of congress to the contrary notwithstanding."

"Provided that if the importer, owner, agent, or consignee of any such goods shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall select two discreet and experienced merchants, citizens of the United * States, [* 272] familiar with the character and value of the goods in question, to examine and appraise the same agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them, and the appraisement thus determined shall be final, and deemed and taken to be the true value of the said goods, and the duties shall be levied thereon accordingly, any act of congress to the contrary notwithstanding."

The plaintiff contends that the rule of appraisement by which the dutiable value of the said goods was raised, and the importer was subjected to the additional duty prescribed by the eighth section of the act of 1846, was illegal and void, and the duties thus claimed and paid under said appraisement were illegally exacted. It may be admitted that the rule, if strictly applied, would, in many cases, lead to erroneous results, and could not be relied upon as a safe guide in any case, but this admission does not establish the nullity of the appraisement. The appraisers are appointed "with powers, by all reasonable ways and means, to ascertain, estimate, and appraise the

true and actual market value and wholesale price" of the importation. The exercise of these powers involve knowledge, judgment, and discretion. And in the event that the result should prove unsatisfactory, a mode of correction is provided by the act. It is a general principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying their validity, are power in the officer and fraud in the party; all other questions are settled by the decision made, or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law." *United States v. Arredondo*, 6 Pet. 691.

The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them. *Decatur v. Paulding*, 14 Pet. 499.

The interposition of the courts, in the appraisement of importations, would involve the collection of the revenue in inextricable confusion and embarrassment. Every importer might feel justified in disputing the accuracy of the judgment of the appraisers, and claim to make proof before a jury, months and even years after the article has been withdrawn from the control of the government, [*273] and when the knowledge of the *transaction has faded from the memories of its officers. The consignee, after he has been notified of the appraisement, is authorized to appeal, and pending the appeal we can see no reason why he may not negotiate with the officers of the customs to correct any error in their judgment. We do not perceive a reason for holding that their control of the subject is withdrawn by the fact of the appeal. The appeal is one of the reasonable ways and means allowed to the importer for ascertaining the true and dutiable value, paramount in its operation to any other when actually employed, but until employed not superseding those confided to the officers. We think, therefore, that the permanent appraisers under the sanction of the collector, (which is to be presumed,) when informed that their decision was contested, had the right to call for the production of the correspondence, and that the plaintiff could not have prosecuted the appeal without a compliance with the requisition.

In this case, the plaintiff neither complied with the requisition nor

prosecuted the appeal, but withdrew it, and settled the duties on the basis of the appraisement of the permanent appraisers. After this, we think he could not dispute the exactness of the appraisement. In *Rankin v. Hoyt*, 4 How. 327, being the case of a disputed appraisement, the jury found the invoice to be correct, and it was urged that the collector could not be justified in following the higher valuation of the appraisers. The court say, "that an appraisal made in a proper case must be followed, or the action of the appraisers would be nugatory, and their appointment and expenses become unnecessary. The propriety of following it cannot, in such a case, be impaired by the subsequent verdict of the jury, differing from it in amount, as the verdict did not exist to guide the collector when the duty was levied, but the appraisal did, and must justify him, or not only the whole system of appraisement would become worthless, but a door be opened to a new and numerous class of actions against collectors, entirely destitute of equity. We say destitute of it, because, in case the importer is dissatisfied with the valuation made by the appraisers, he is allowed by the act of congress, before paying the duty, an appeal and further hearing before another tribunal."

In the case before us the plaintiff withheld the information which might have satisfied the officers of the government, after a legal requisition upon him. He abandoned the claim for a hearing before "persons familiar with the character and value of the goods in question," "discreet and experienced merchants," and preferred a tedious and vexatious litigation. We think, as was said by the court in the case above cited, "he cannot with much grace complain afterwards that any over-estimate existed."

* We shall now inquire whether, upon the reëxportation [* 274] of the Peruvian bark entered for warehousing, the plaintiff was entitled to a return of the twenty per cent. of additional duty charged upon the portion so exported.

An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty.

The provision for the return of the duty upon a reëxportation, formed a part of the system of regulations for importation and

Carroll v. Carroll's Lessee. 16 H.

revenue from the earliest period of the government, and has always been understood to establish relations between the regular and honest importer and the government.

It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice. A construction, which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing. We are satisfied that the existing laws relating to exportations, with the benefit of drawback, do not apply to relieve the person who has incurred by an undervaluation of his import, this additional duty from the payment of any portion of it.

Our conclusion is, there is no error in the record, and the judgment of the circuit court is affirmed.

18 H. 521 ; 24 H. 508.

JANE M. CARROLL, Plaintiff in Error, v. Lessee of GEORGE W. CARROLL, DE ROSZ CARROLL, ROBERT D. CARROLL, CHARLES W. CARROLL, JOHN M. MARTIN, and AMERICA, his Wife, and JOHN FORD, and MARY, his Wife.

16 H. 275.

The statute of Maryland, passed in 1850, concerning the effect of wills upon after-acquired lands, did not apply to a will executed before the first day of June, 1850, the testator having survived until after that day.

This court cannot rest its judgment upon an opinion of a state court, concerning the construction of a statute of the State, if it was not necessary to construe the statute in order to decide the case in which the opinion was pronounced. Under such circumstances, this court must examine the question of construction, and decide it, as seems to them right.

THE case is stated in the opinion of the court.

Schley and Alexander, for the plaintiff.

Nelson and Johnson, contra.

[* 279] * CURTIS, J., delivered the opinion of the court.

This action of ejectment was brought in the circuit court of the United States for the district of Maryland, to recover three undivided fourth parts of three tracts of land lying in Prince George's county, in that State. Both parties claimed under Michael B. Carroll; the plaintiffs as heirs at law, the defendant as devisee. It ap-

peared at the trial, in the court below, which was had at the November term, 1852, that on the 10th day of September, 1837, Michael B. Carroll duly executed his last will, the material parts of which are as follows : —

*To my dear wife, Jane, I give and bequeathe all my [* 280] slaves, and do request that none of them may be sold or disposed of for the payment of my debts, but that provision shall be made for discharging the same out of the other personal property and effects which I shall leave at the time of my death.

All the rest and residue of my property, both real, personal, and mixed, I give, devise, and bequeathe to my said wife, Jane, who I do hereby constitute and appoint sole executrix of this my last will and testament ; enjoining it upon her, nevertheless, to consult and advise with the said John B. Brooke, as occasion may require, respecting the settlement of estate, and make him a reasonable compensation for the same out of the funds hereinbefore bequeathed to her ; and I do hereby revoke and annul all former wills by me heretofore made, declaring this, and none other, to be my last will and testament.

It further appeared, that after the execution of this will, Michael B. Carroll acquired other lands, and the plaintiffs, as heirs at law, claimed to recover three undivided fourth parts thereof as undeviseed land. The defendant insisted that these, together with all the other lands of the testator, passed to her under the residuary clause of the will. She admitted that, by the common law of Maryland, lands of which the testator was not seised at the time of making his will, could not be devised thereby, but insisted that an act passed by the legislature of Maryland, on the 22d day of February, 1850, so operated as to cause this will to devise the lands to her. That act is as follows : —

Section 1. Be it enacted by the general assembly of Maryland, That every last will and testament, executed in due form of law, after the first day of June next, shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed on the day of the death of the testator or testatrix, unless a contrary intention shall appear by the will.

Section 2. And be it enacted, That the provisions of this act shall not apply to any will executed before the passage of this act, by any person who may die before the first day of June next, unless in such will the intention of the testator or testatrix shall appear that the real and personal estate which he or she may own at his or her death, should thereby pass.

Section 3. And be it enacted, That this law shall take effect on the first day of June next.

It is argued by the counsel for the devisee that the first section of this act was intended to prescribe a new rule of construction of wills, and to fix the time when the courts should begin to apply [*281] that rule; that new rule being, that wills of the *realty should be deemed to speak at the time of the death of the testator; and the time when the courts should begin so to construe them, being the second day of June, 1850; and that the law should be so read as to mean that, after the first day of June, 1850, wills should be deemed to speak as if executed on the day of the testator's death, unless a contrary intention should appear.

To this construction there are insuperable objections. It would change the legal operation not only of existing wills, but of those which had already taken effect by the death of testators. It would make the same will, if offered in evidence on the 2d day of June, operative to pass after-acquired lands to a devisee, though if offered in evidence on the next preceding day it would be inoperative for that purpose. The object of the whole law concerning wills, is to enable the owners of property reasonably to control its disposition at their decease. To cause their real intentions and wishes to be so expressed, and their expression to be so preserved and manifested that they can be ascertained and carried into effect, are the chief purposes of legislation on this subject. So to interpret an act concerning wills as to cause those instruments to operate without regard to the intent of the testator, having one effect to-day and another to-morrow, would not only be arbitrary and a violation of the principles of natural justice, but in conflict with what must be presumed to have been the leading purpose of the legislature in passing the law, the better to give effect to the intent of the testator. To induce the court to believe the legislature intended to make this law retro-active upon a will then in existence, and cause it to pass after-acquired lands without any evidence that the testator desired or believed that it would do so, and to fix a particular day, before which the will should not so operate, and on and after which it should so operate, such intention of the legislature must be expressed with irresistible clearness. *Battle v. Speight*, 9 Ired. 288. It is very far from being so expressed in the first section of this act. On the contrary, its natural and obvious meaning is, that wills, executed after the first day of June, 1850, are the only subjects of its provisions.

The words "after the first day of June next," refer to and qualify the words "executed in due form of law," which they follow, just as,

in the same section, the words "on the day of the death of the testator" refer to and qualify the word "executed." In the former case, they indicate the time when the will shall be deemed to have been executed; in the latter, the period of time when it was actually executed.

In our opinion, the first section of this law is free from ambiguity, *and applies only to wills executed after the first [* 282] day of June, 1850; and, as this will was executed before that day, it is not within this section.

Nor is it within the second section of the act; because that applies only to cases in which the testator having executed his will before the passage of the act, might die before the first day of June then next, and this testator survived till after that day.

It has been supposed however, that although the first section of this act is free from ambiguity standing by itself, and ought to be so construed as to apply only to wills executed after the first day of June, 1850, yet that the second section shows that wills executed before that day were intended to be included in the first section. The argument is, that the second section excepts out of the operation of the first section certain wills executed before the first day of June, 1850, and thus proves that the first section embraces wills executed before that day. This argument requires a careful examination. To appreciate it, we must see clearly what are the nature and objects, as well as the form of the two enactments. The first prescribes a new rule of construction of wills. They are to be deemed to speak as of the time of the death of the testator; but power is reserved to him to set aside this rule by manifesting in his will an intention not to have it applied. The real substance and effect of the second section is to enable certain testators to pass their after-acquired lands by expressing an intention to pass them.

By force of the first section, the law prescribes a rule of construction, which a testator may set aside. By force of the second section, a testator may manifest an intention to have his will speak as of the time of his decease, and so adopt that rule of construction. It thus appears that the office of the second section is not to take certain cases out of the operation of the first section, but to prescribe another and substantially different rule of law for those cases. It is true, negative language is used, which leaves the law open to the suggestion that the provision of the act would have applied to such wills if the negative words had not been used.

But it must be remembered that this is only an inference, the strength of which must depend upon the subject-matter of the provisions and the language employed in making them.

If every part of the law can have its natural meaning and appropriate effect by construing this second section as an additional enactment, and if to construe it as an exception would affix to the first section a meaning which would be inconsistent with the great and leading purpose of the legislature, and at the same time be [* 283] arbitrary and unjust; and if when viewed as an *exception, the cases can, on no just principle, be distinguished from those left unexcepted, then manifestly it should not be construed as an exception, but as a substantive enactment, prescribing for the particular cases a new rule of law not provided for in the first section. We have already pointed out the consequence of holding the first section applicable to all wills. In addition to this, it is worth while to inquire if the second section was designed to except certain cases out of the first section, what those cases were, and how they are so distinguished from the cases left unexcepted as to be proper subjects of exception. The proposition is, that the first section includes all wills whenever executed, and the second excepts only wills executed before the passage of the act by persons dying after the passage of the act, and before the first day of June, 1851. Can any reason be imagined why a will executed before the passage of the act, should be within the first section if the testator died the day before the passage of the act, and out of it if he died the day after its passage? If there is any distinction between the two cases, it would seem the first case had the stronger claim to exemption from the effect of the new rule.

Nor do we perceive any difficulty in so construing the two sections as to allow to each its appropriate effect, while neither of them violates any principle of natural right; the effect of the first section being to prescribe a new rule of interpretation for wills executed after the first of June, and the effect of the second being, to enable testators who had executed their wills before the passage of the act, and who might die before the first day of June, to pass after-acquired lands, if they manifested an intention so to do. Cases of testators who should execute wills after the passage of the act, and before the first day of June, or who should die after that day, having previous to that day executed their wills, are left unprovided for, either because it was thought that they would have sufficient time to conform their wills to this change of the law, or because their cases escaped the attention of the legislature, as happened in *Barnitz's Lessee v. Casey*, 7 Cranch, 468; and *Brewer's Lessee v. Blougher*, 14 Pet. 178.

We have been referred to two decisions in the supreme court of Massachusetts, in which a retroactive effect was allowed to a statute of that State upon existing wills. They are *Cushing v. Alwin*, 12

Met. 169 ; Pray v. Waterston, 12 Met. 262. But an examination of those cases will show that the interpretation put by that court on that statute was attended with none of the difficulties which beset the construction of the statute of Maryland contended for by the counsel for the devisee. The law of Massachusetts did not enact a new rule of construction. * It simply enabled tes- [* 284] tators to devise after-acquired lands by plainly and manifestly declaring an intention to do so. The law could only operate in furtherance of the intention of the testator, and could never defeat that intent, by applying to wills an arbitrary rule of construction.

This distinction was pointed out by this court in *Smith et al. v. Edrington*, 8 Cranch, 66, in reference to a similar statute in Virginia, respecting which Mr. Justice Washington said : " The law creates no new or different rule of construction, but merely gave a power to the testator to devise lands which he might possess or be entitled to at the time of his death, if it should be his pleasure to do so." Moreover, the language of the act of Massachusetts was broad and general enough to include in its terms all wills which should take effect after the law went into operation. There was, therefore, nothing in the words or the subject-matter of the act, to lead the court to a more restricted construction. Still, that court thought the retroactive effect of even such a law required some notice, and they vindicate the departure from an important principle in that case with some effort; and the reluctance with which it should be departed from, is well expressed by the supreme court of North Carolina, in *Battle v. Speight*, 9 Ired. 288, in construing a similar statute of that State.

We have also been referred to a manuscript opinion of the court of appeals of the State of Maryland upon the effect of this will. It appears that in November last the executors of Mrs. Carroll, the devisee, who is deceased, filed their bill in the circuit court of Prince George's county, praying that the administrators, *de bonis non* of Michael B. Carroll, might be enjoined from making sale of his negro slaves. The heirs at law, and the administrators *de bonis non* of Michael B. Carroll, were made parties. The circuit court refused the injunction, the complainants appealed, the court of appeals affirmed the decree of the circuit court, and dismissed the bill. The grounds upon which the court rested its decree will best appear from the following extracts from the opinion : —

" The bill is filed by the executors of Mrs. Carroll against the administrators *de bonis non* of Mr. Carroll and his heirs at law. The gravamen of it is, that he specifically bequeathed his negroes to his wife, and desired they should not be sold, and that his debts should be paid out of his other estate ; that she manumitted them,

and that there is other personal and real estate enough to pay the debts due by his estate. Injunction is asked to prevent the sale of the negroes under an order of the orphans' court of Prince George's county, which, it is alleged, is about to be done. It is also [* 285] claimed in the bill, that, at the time of * the will of Mrs. Carroll, she must be considered as holding the negroes as legatee, and not as executrix, the time specified by law for winding up the estate of her husband having elapsed.

" This last ground cannot avail. There is no allegation in the bill that a final account had been settled by her, and the bill shows that a large amount of debts remained unpaid, and that the creditors of the estate of her husband had commenced proceedings to secure their payment, which proceedings are still pending. In this claim of the bill, we suppose but little confidence was or is reposed by those who framed it; at all events, there is nothing in it. There is nothing in the facts of the case to justify the presumption that there had been a final settlement of the estate of Michael B. Carroll, and all his debts paid off; the truth is, the bill directly contradicts the facts out of which such a presumption could arise.

" It is contended, on the part of the complainants, that the real estate and personal property, other than the negroes of Michael B. Carroll, ought to be applied to the payment of his debts before the negroes are resorted to. This may or not be so; and in regard to it we pass no opinion, because the question is not before us in this case. This is not a bill filed on behalf of the negroes, but by the executors of Mrs. Carroll, and they must occupy the same position in regard to the creditors of Michael B. Carroll, who are represented by the administrators *de bonis non*, as she would have done had the bill been filed by her instead of by them. And if she were the party complainant, how would the case stand? Why, thus: Michael B. Carroll died in debt, leaving a will by which his real and personal estate is specifically devised and bequeathed to his wife. His creditors would have the right to proceed against his entire estate for payment; first, however, against the personal as the primary fund. Their rights could not be affected by any thing he might request in his will; their claims would attach to his entire estate. He did not manumit his slaves; and, moreover, this is not the case of contribution and marshalling of assets between different devisees and legatees, because here Mrs. Carroll was specific devisee and legatee, and residuary devisee and legatee; she, in fact, with but trifling exception, took under the will the whole estate. Had she, immediately on obtaining letters of administration, manumitted the negroes, it could not be pretended such manumission could have affected the rights of

the creditors of her testator ; and it must be obvious, if she could not do it by her act as executrix, that she could not accomplish it by her will.

“ For these reasons we affirm the order of the circuit court refusing the injunction.”

* It is apparent that the question, whether some of the [* 286] lands of the testator were undevised could not enter into or affect the decision of this case. The negroes not being parties, no question could arise whether they were entitled to have the debts paid out of the land of the testator, and the court declares the question is not before them. As between Mrs. Carroll, the executrix of her husband's will, or her representatives and the creditors of her husband, the right of the latter was complete to resort to the personal property, including the negroes, and it was, therefore, wholly immaterial who owned the land. The only prayer in the bill was, that the creditors, through the administrators, might be restrained from making their debts out of the negroes. The only question in the case was, whether they could be so restrained. And when it was decided that their legal right was to have all the personalty, including the negroes, applied to their debts, it was immaterial what other rights they or others might have.

We do not consider, therefore, that a comparison of the titles of the heirs at law and the devisee of Michael B. Carroll to his lands, was brought into judgment by this injunction bill.

If the court of appeals had found it necessary to construe a statute of that State, in order to decide upon the rights of parties subject to its judicial control, such a decision, deliberately made, might have been taken by this court as a basis on which to rest our judgment. But it must be remembered that we are bound to decide a question of local law, upon which the rights of parties depend, as well as every other question, as we find it ought to be decided. In making the examination preparatory to this finding, this court has followed two rules, one of which belongs to the common law, and the other is a part of our peculiar judicial system. The first is the maxim of the common law, *stare decisis*. The second grows out of the thirty-fourth section of the judiciary act, (1 Stats. at Large, 92,) which makes the laws of the several States the rules of decision in trials at the common law ; and inasmuch as the States have committed to their respective judiciaries the power to construe and fix the meaning of the statutes passed by their legislatures, this court has taken such constructions as part of the law of the State, and has administered the law as thus construed. But this rule has grown up, and been held with constant reference to the other rule, *stare decisis* ; and it is only

so far and in such cases as this latter rule can operate, that the other has any effect.

If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, [* 287] * then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined, to fix the rights of the parties, and decide to whom the property in contestation belongs.

And, therefore, this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. The State of Virginia*, 6 Wheat. 399, this court was much pressed with some portion of its opinion in the case of *Marbury v. Madison*. And Mr. Chief Justice Marshall said: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." The cases of *Ex parte Christy*, 3 How. 292, and *Peck v. Jenness et al.* 7 *ibid.* 612, are an illustration of the rule, that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains.

With these views, we cannot regard the opinion of the court of appeals as an authority on which we have a right to rest our judgment. We have already stated the reasons which have brought us to a different construction of the statute; reasons which do not seem to us to be shaken by the opinion of the court of appeals.

Our conclusion is, that the will of Michael B. Carroll was not within the statute, and the lands in question were consequently undevised.

One other exception was taken at the trial, respecting which it is only necessary to say that we think the identity of name of the two tracts of land in the same county, taken in connection with the long possession of those under whom the plaintiffs claimed, and the absence of all evidence of any adverse claim or outstanding title, was

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sufficient to warrant the jury in finding that the land was embraced in the patents from the State.

We are also of opinion that the judgment is correct in form, being for the term which the declaration alleges was created by
 * the plaintiffs as owners of three undivided fourth parts of [* 288]
 the land.

The judgment of the circuit court is affirmed, with costs.

19 H. 393.

WILLIAM A. SMITH and others, v. LEROY SWORMSTEDT and others.

16 H. 288.

Upon a bill in equity by several travelling preachers of the Methodist Episcopal Church South, in behalf of themselves and the other travelling preachers of that organization, *held*,

1. That as numerous parties had a common interest in the fund in controversy, a few might sue, representing the others.
2. That the General Conference, in 1844, had power to consent to the division of the Methodist Episcopal Church into two bodies, and that the separation was not a secession of a part of the travelling preachers from that church, but a division, in pursuance of proper authority.
3. That this division carried with it, as matter of law, a division of the common property, which belonged to the travelling preachers, as such.
4. That the removal of the sixth restrictive article, was not a condition to the enjoyment by the Church South of its share of the common fund, but to enable the General Conference to make the division.
5. That as the complainants not only represent the other travelling preachers South, but the "Book Concern" there, the share of the fund they thus represent may properly be paid over to them.

THE case is stated in the opinion of the court.

Stanberry, for the appellants.

Badger and Ewing, contra.

* NELSON, J., delivered the opinion of the court. [* 298]

This is an appeal from a decree of the circuit court of the United States for the district of Ohio.

The bill is filed by the complainants, for themselves, and in behalf of the travelling and worn-out preachers in connection with the society of the Methodist Episcopal Church South in the United States, against the defendants, to recover their share of a fund called the Book Concern, at the city of Cincinnati, consisting of houses, machinery, printing presses, bookbindery, books, &c., claimed to be of the value of some \$200,000.

The bill charges that, at and before the year 1844, there existed in the United States a voluntary association unincorporated, known as

the Methodist Episcopal Church, composed of seven bishops, four thousand eight hundred and twenty-eight preachers belonging to the travelling connection, and in bishops, ministers, and members about one million one hundred and nine thousand nine hundred and sixty, united, and bound together in one organized body by certain doctrines of faith and morals, and by certain rules of government and discipline.

[* 299] * That the government of the church was vested in one body called the General Conference, and in certain subordinate bodies called annual conferences, and in bishops, travelling ministers, and preachers.

The bill refers to a printed volume, entitled "The Doctrines and Discipline of the Methodist Episcopal Church," as containing the constitution, organization, form of government, and rules of discipline, as well as the doctrines of faith of the association.

The complainants further charge, that differences and disagreements had sprung up in the church between what was called the northern and southern members, in respect to the administration of the government with reference to the ownership of slaves by the ministers of the church, of such a character and attended with such consequences as threatened greatly to impair its usefulness, as well as permanently to disturb its harmony; and it became and was a question of grave and serious importance whether a separation ought not to take place, according to some geographical boundary to be agreed upon, so as that the Methodist Episcopal Church should thereafter constitute two separate and distinct organizations. And that, accordingly, at a session of the General Conference held in the city of New York in May, 1844, a resolution was passed by a majority of over three fourths of the body, by which it was determined, that, if the annual conferences of the slaveholding States should find it necessary to unite in a distinct ecclesiastical connection, the following rule should be observed with regard to the northern boundary of such connection—all the societies, stations, and conferences adhering to the church in the south, by a vote of a majority of the members, should remain under the pastoral care of the southern church; and all adhering to the church north, by a like vote, should remain under the pastoral care of that church. This plan of separation contains eleven other resolutions, relating principally to the mode and terms of the division of the common property of the association between the two divisions, in case the separation contemplated should take place; and which, in effect, provide for a *pro rata* division, taking the number of the travelling preachers in the church north and south as the basis upon which to make the partition.

The complainants further charge that, in pursuance of the above resolutions, the annual conferences in the slaveholding States met, and resolved in favor of a distinct and independent organization, and erected themselves into a separate ecclesiastical connection, under the provisional plan of separation based upon the discipline of the Methodist Episcopal Church, and to *be [* 300] known as the Methodist Episcopal Church South. And they insist that, by virtue of these proceedings, this church, as it had existed in the United States previous to the year 1844, became and was divided into two separate churches, with distinct and independent powers, and authority composed of the several annual conferences, stations, and societies, lying north and south of the aforesaid line of division. And, also, that by force of the same proceedings, the division of the church south became and was entitled to its proportion of the common property real and personal of the Methodist Episcopal Church, which belonged to it at the time the separation took place ; that the property and funds of the church had been obtained by voluntary contributions, to which the members of the church south had contributed more than their full share, and which, down to the time of the separation, belonged in common to the Methodist Episcopal Church, as then organized.

The complainants charge, that they are members of the church south, and preachers, some of them supernumerary, and some superannuated preachers, and belonged to the travelling connection of said church ; and that, as such, have a personal interest in the property, real and personal, held by the church north, and in the hands of the defendants ; and, further, that there are about fifteen hundred preachers belonging to the travelling connection of the church south, each of whom has a direct and personal interest in the same right with the complainants in the said property, the large number of whom make it inconvenient and impracticable to bring them all before the court as complainants.

They also charge, that the defendants are members of the Methodist Episcopal Church North ; and that each, as such, has a personal interest in the property ; and further, that two of them have the custody and control of the fund in question ; and that, in addition to these defendants, there are nearly thirty-eight hundred preachers belonging to the travelling connection of the church north, each of whom has an interest in the fund in the same right, so that it is impossible, in view of sustaining a just decision in the matter, to make them all parties to the bill.

The complainants also aver that this bill is brought by the authority, and under the direction, of the general and annual conferences of

the church south, and for the benefit of the same, and for themselves, and all the preachers in the travelling connection, and all other ministers and persons having an interest in the property.

The defendants, in their answer, admit most of the facts charged in the bill, as it respects the organization, government, discipline, [*301] and faith of the Methodist Episcopal Church as it existed at and previous to the year 1844. They admit the passage of the resolutions, called the plan of separation, at the session of the General Conference of that year, by the majority stated; but deny that the resolutions were duly and legally passed; and also deny that the General Conference possessed the competent power to pass them, and submit that they were therefore null and void. They also submit that, if the General Conference possessed the power, the separation contemplated was made dependent upon certain conditions, and among others a change of the sixth restrictive article in the constitution of the church, by a vote of the annual conferences, which vote the said conferences refused.

The defendants admit the erection of the church south into a distinct ecclesiastical organization; but deny, that this was done agreeably to the plan of separation. They deny that the Methodist Episcopal Church, as it existed in 1844, or at any time, has been divided into two distinct and separate ecclesiastical organizations; and submit that the separation and voluntary withdrawal from this church of a portion of the bishops, ministers, and members, and organization into a church south, was an unauthorized separation; and that they have thereby renounced and forfeited all claim, either in law or equity, to any portion of the property in question. The defendants admit that the Book Concern at Cincinnati, with all the houses, lots, printing presses, &c., is now and always has been beneficially the property of the preachers belonging to the travelling connection of the Methodist Episcopal Church; but insist that, if such preachers do not, during life, continue in such travelling connection, and in the communion, and subject to the government of the church, they forfeit for themselves and their families all ownership in, or claim to the said Book Concern, and the produce thereof; they admit that the Book Concern was originally commenced and established by the travelling preachers of this church, upon their own capital, with the design in the first place of circulating religious knowledge, and that, at the General Conference of 1796, it was determined that the profits derived from the sale of books should in future be devoted wholly to the relief of travelling preachers, supernumerary and worn-out preachers, and the widows and orphans of such preachers — and the defendants submit that the Methodist Episcopal Church South is

not entitled at law or in equity to have a division of the property of the Book Concern, or the produce, or to any portion thereof; and that the ministers, preachers, or members, in connection with such church, are not entitled to any portion of the same; and further, that being no *longer travelling preachers belonging to the [* 302] Methodist Episcopal Church, they are not so entitled, without a change of the sixth restrictive article of the constitution of 1808, provided for in the plan of separation, as a condition of the partition of said fund.

The proofs in the case consist chiefly of the proceedings of the General Conference of 1844, relating to the separation of the church and of the proceedings of the southern conferences, in pursuance of which a distinct and separate ecclesiastical organization south took place.

There is no material controversy between the parties, as it respects the facts. The main difference lies in the interpretation and effect to be given to the acts and proceedings of these several bodies and authorities of the church. Our opinion will be founded almost wholly upon facts alleged in the bill, and admitted in the answer.

An objection was taken, on the argument, to the bill for want of proper parties to maintain the suit. We think the objection not well founded.

The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest. Story's Eq. Pl. §§ 97, 98, 99, 103, 107, 110, 111, 116, 120; 2 Mitf. Pl. (Jer. Ed.) 167, 2 Paige, 19; 4 Mylne & Cr. 134, 619; 2 De Gex & Smale, 102, 122.

Story, J., in his valuable treatise on Equity Pleadings, after discussing this subject with his usual research and fulness, arranges the exceptions to the general rule, as follows: 1. Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole. 2. Where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; and 3. Where the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impracticable to bring them all before the court.

In this latter class, though the rights of the several persons may be separate and distinct, yet there must be a common interest or a common right, which the bill seeks to establish or enforce. As an illus-

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tration, bills have been permitted to be brought by the lord of a manor against some of the tenants, and *vice versâ*, by some of the tenants, in behalf of themselves and the other tenants, to establish some right — such as suit to a mill, or right of common, or [* 303] to cut turf. So by a parson of a * parish against some of the parishioners to establish a general right to tithes — or conversely, by some of the parishioners in behalf of all to establish a parochial modus.

In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.

Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

The case in hand illustrates the propriety and fitness of the rule. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice. The right might be defeated by objections to parties, from the difficulty of ascertaining them, or if ascertained, from the changes constantly occurring by death or otherwise.

As it respects the persons into whose hands the fund in question should be delivered for the purpose of distribution among the beneficiaries, in case of a division of it, we shall recur to the subject in another part of this opinion.

We will now proceed to an examination of the merits of the case.

The Book Concern, the property in question, is a part of a fund which had its origin at a very early day, from the voluntary contributions of the travelling preachers in the connection of the Methodist Episcopal Church. The establishment was at first small; but at present, is one of very large capital, and of extensive operations,

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producing great profits. In 1796, the travelling preachers in general conference assembled, determined that these profits should be thereafter devoted to the relief of the travelling preachers, and their families; and, accordingly *resolved that the pro- [* 304] duce of the sale of the books, after the debts were paid, and sufficient capital provided for carrying on the business, should be applied for the relief of distressed travelling preachers, for the families of travelling preachers, and for supernumerary and worn-out preachers, and the widows and orphans of preachers.

The establishment was placed under the care and superintendence of the General Conference, the highest authority in the church, which was composed of the travelling preachers; and it has grown up to its present magnitude, its capital amounting to nearly a million of dollars, from the economy and skill with which the concern has been managed, and from the labors and fidelity of the travelling preachers, who have always had the charge of the circulation and sale of the books in the Methodist connection throughout the United States, accounting to the proper authorities for the proceeds. The agents who have the immediate charge of the establishment make up a yearly account of the profits, and transmit the same to the several annual conferences, each, an amount in proportion to the number of travelling preachers, their widows and orphans comprehended within it, which bodies distribute the fund to the beneficiaries individually, agreeably to the design of the original founders. These several annual conferences are composed of the travelling preachers residing or located within certain districts assigned to them; and comprehended, in the aggregate, the entire body in connection with the Methodist Episcopal Church. The fund has been thus faithfully administered since its foundation down to 1846, when the portion belonging to the complainants in this suit, and those they represent, was withheld, embracing some thirteen of the annual conferences.

In the year 1844, the travelling preachers in general conference assembled, for causes which it is not important particularly to refer to, agreed upon a plan for division of the Methodist Episcopal Church in case the annual conferences in the slaveholding States should deem it necessary; and to the erection of two separate and distinct ecclesiastical organizations. And according to this plan, it was agreed that all the societies, stations, and conferences adhering to the church south, by a majority of their respective members, should remain under the pastoral care of that church; and all of these several bodies adhering, by a majority of its members, to the church north, should remain under the pastoral care of that church; and, further, that the ministers, local and travelling, should, as they might prefer, attach them-

selves, without blame, to the church north or south. It was also agreed that the common property of the church, including [* 305] * this Book Concern, that belonged specially to the body of travelling preachers, should, in case the separation took place, be divided between the two churches in proportion to the number of travelling preachers falling within the respective divisions. This was in 1844. In the following year the southern annual conferences met in convention, in pursuance of the plan of separation, and determined upon a division, and resolved that the annual conferences should be constituted into a separate ecclesiastical connection, and based upon the discipline of the Methodist Episcopal Church, comprehending the doctrines and entire moral, ecclesiastical, and economical rules and regulations of said discipline, except only so far as verbal alterations might be necessary ; and to be known by the name of the Methodist Episcopal Church South.

The division of the church, as originally constituted, thus became complete ; and from this time two separate and distinct organizations have taken the place of the one previously existing.

The Methodist Episcopal Church having been thus divided, with the authority and according to the plan of the General Conference, it is claimed on the part of the complainants, who represent the travelling preachers in the church south, that they are entitled to their share of the capital stock and profits of this Book Concern ; and that the withholding of it from them is a violation of the fundamental law prescribed by the founders, and consequently of the trust upon which it was placed in the hands of the defendants.

The principal answer set up to this claim is, that, according to the original constitution and appropriation of the fund, the beneficiaries must be travelling preachers, or the widows and orphans of travelling preachers, in connection with the Methodist Episcopal Church, as organized and established in the United States at the time of the foundation of the fund ; and that, as the complainants, and those they represent, are not shown to be travelling preachers in that connection, but travelling preachers in connection with a different ecclesiastical organization, they have forfeited their right, and are no longer within the description of its beneficiaries.

'This argument, we apprehend, if it proves any thing, proves too much ; for if sound, the necessary consequence is that the beneficiaries connected with the church north, as well as south, have forfeited their right to the fund. It can no more be affirmed, either in point of fact or of law, that they are travelling preachers in connection with the Methodist Church as originally constituted, since the division, than of those in connection with the church

south. Their organization covers but about half of the *territory embraced within that of the former church; and [* 306] includes within it but a little over two thirds of the travelling preachers. Their general conference is not the general conference of the old church, nor does it represent the interest, or possess territorially the authority of the same; nor are they the body under whose care this fund was placed by its founders. It may be admitted that, within the restricted limits, the organization and authority are the same as the former church. But the same is equally true in respect to the organization of the church south.

Assuming, therefore, that this argument is well founded, the consequence is that all the beneficiaries of the fund, whether in the southern or northern division, are deprived of any right to a distribution, not being in a condition to bring themselves within the description of persons for whose benefit it was established; in which event the foundation of the fund would become broken up, and the capital revert to the original proprietors, a result that would differ very little in its effect from that sought to be produced by the complainants in their bill.

It is insisted, however, that the General Conference of 1844 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division; and hence, that the organization of the church south was without authority, and the travelling preachers within it separated from an ecclesiastical connection which is essential to enable them to participate as beneficiaries. Even if this were admitted, we do not perceive that it would change the relative position and rights of the travelling preachers within the divisions north and south, from that which we have just endeavored to explain. If the division under the direction of the General Conference has been made without the proper authority, and for that reason the travelling preachers within the southern division are wrongfully separated from their connection with the church, and thereby have lost the character of beneficiaries, those within the northern division are equally wrongfully separated from that connection, as both divisions have been brought into existence by the same authority. The same consequence would follow in respect to them, that is imputable to the travelling preachers in the other division; and hence each would be obliged to fall back upon their rights as original proprietors of the fund.

But we do not agree that this division was made without the proper authority. On the contrary, we entertain no doubt but that the General Conference of 1844 was competent to make it; and that each division of the church, under the separate organization, is just as

legitimate, and can claim as high a sanction, ecclesiastical [* 307] and temporal, as the Methodist Episcopal * Church first founded in the United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one.

In 1784, when this church was first established, and down till 1808, the General Conference was composed of all the travelling preachers in that connection. This body of preachers founded it by organizing its government, ecclesiastical and temporal, established its doctrines and discipline, appointed its superintendents or bishops, its ministers and preachers, and other subordinate authorities, to administer its polity, and promulgate its doctrines and teachings throughout the land.

It cannot therefore be denied ; indeed, it has scarcely been denied, that this body, while composed of all the travelling preachers, possessed the power to divide it, and authorize the organization and establishment of the two separate independent churches. The power must necessarily be regarded as inherent in the General Conference. As they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one, so they might at any subsequent period, the power remaining unchanged.

But it is insisted that this power has been taken away or given up by the action of the General Conference of 1808. In that year, the constitution of this body was changed so as to be composed thereafter by travelling preachers, to be elected by the annual conferences, in the ratio of one for every five members. This has been altered from time to time, so that, in 1844, the representation was one for every twenty-one members. At the time of this change, and as part of it, certain limitations were imposed upon the powers of this General Conference, called the six restrictive articles: 1. That they should not alter or change the articles of religion, or establish any new standard of doctrine. 2. Nor allow of more than one representative for every fourteen members of the annual conferences, nor less than one for every thirty. 3. Nor alter the government so as to do away with episcopacy, or destroy the plan of itinerant superintendencies. 4. Nor change the rules of the united societies. 5. Nor deprive the ministers or preachers of trial by a committee, and of appeal ; nor members before the society, or lay committee, and appeal. And 6. Nor appropriate the proceeds of the Book Concern, nor the charter-fund, to any purpose other than for the benefit of the travelling, supernumerary, superannuated, and worn-out preachers, their

wives, widows, and children. Subject to these restrictions, the delegated conference possessed the same powers as when composed of the entire body of preachers. *And it will be seen [* 308] that these relate only to the doctrine of the church, its representation in the General Conference, the episcopacy, discipline of its preachers and members, the Book Concern and charter-fund. In all other respects, and in every thing else that concerns the welfare of the church, the General Conference represents the sovereign power the same as before. This is the view taken by the General Conference itself, as exemplified by the usage and practice of that body. In 1820, they set off to the British Conference of Wesleyan Methodists the several circuits and societies in Lower Canada. And in 1828, they separated the Annual Conference of Upper Canada from their jurisdiction, and erected the same into a distinct and independent church. These instances, together with the present division, in 1844, furnish evidence of the opinions of the eminent and experienced men of this church in these several conferences, of the power claimed, which, if the question was otherwise doubtful, should be regarded as decisive in favor of it. We will add that all the northern bishops, five in number, in council in July, 1845, acting under the plan of separation, regarded it as of binding obligation, and conformed their action accordingly.

It has also been urged, on the part of the defendants, that the division of the church, according to the plan of the separation, was made to depend not only upon the determination of the southern annual conferences, but also upon the consent of the annual conferences north, as well as south, to a change of the sixth restrictive article; and as this was refused, the division which took place was unauthorized. But this is a misapprehension. The change of this article was not made a condition of the division. That depended alone upon the decision of the southern conferences.

The division of the Methodist Episcopal Church having thus taken place, in pursuance of the proper authority, it carried with it, as matter of law, a division of the common property belonging to the ecclesiastical organization, and especially of the property in this Book Concern, which belonged to the travelling preachers. It would be strange if it could be otherwise, as it respects the Book Concern, inasmuch as the division of the association was effected under the authority of a body of preachers who were themselves the proprietors and founders of the fund.

It has been argued, however, that, according to the plan of separation, the division of the property in this Book Concern was made to depend upon the vote of the annual conferences to change the sixth

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restrictive article, and that, whatever might be the legal [*309] effect of the division of the church upon the common *property otherwise, this stipulation controls it, and prevents a division till the consent is obtained.

We do not so understand the plan of separation. It admits the right of the church south to its share of the common property, in case of a separation, and provides for a partition of it among the two divisions, upon just and equitable principles; but, regarding the sixth restrictive article as a limitation upon the power of the General Conference, as it respected a division of the property in the Book Concern, provision is made to obtain a removal of it. The removal of this limitation is not a condition to the right of the church south to its share of the property, but is a step taken in order to enable the General Conference to complete the partition of the property.

We will simply add that, as a division of the common property followed, as matter of law, a division of the church organization, nothing short of an agreement or stipulation of the church south to give up their share of it, could preclude the assertion of their right; and, it is quite clear, no such agreement or stipulation is to be found in the plan of separation. The contrary intent is manifest from a perusal of it.

Without pursuing the case further, our conclusion is, that the complainants, and those they represent, are entitled to their share of the property in this Book Concern. And the proper decree will be entered to carry this decision into effect.

The complainants represent not only all the beneficiaries in the division of the church south, but also the General Conference and the annual conferences of the same. The share, therefore, of this Book Concern belonging to the beneficiaries in that church, and which its authorities are entitled to the safe-keeping and charge of, for their benefit, may be properly paid over to the complainants as the authorized agents for this purpose.

We shall accordingly direct a decree to be entered, reversing the decree of the court below, and remanding the proceedings to that court, directing a decree to be entered for the complainants against the defendants; and a reference of the case to a master to take an account of the property belonging to the Book Concern, and report to the court its cash value, and to ascertain the portion belonging to the complainants, which portion shall bear to the whole amount of the fund the proportion that the travelling preachers in the division of the church south bore to the travelling preachers in the church north, at the time of the division of said church. And on the coming

in of the report, and confirmation of the same, a decree shall be entered in favor of the complainants for that amount.

**Order.* This cause came on to be heard on the trans- [* 310]cript of the record, from the circuit court of the United States for the district of Ohio, and was argued by counsel. On consideration whereof it is ordered, adjudged, and decreed by this court that the decree of said circuit court in this cause be and the same is hereby reversed and annulled. And this court doth further find, adjudge, and decree:—

1. That, under the resolutions of the General Conference of the Methodist Episcopal Church, holden at the city of New York, according to the usage and discipline of said church, passed on the eighth day of June, in the year of our Lord one thousand eight hundred and forty-four, (in the pleadings mentioned,) it was, among other things, and in virtue of the power of the said General Conference, well agreed and determined by the Methodist Episcopal Church in the United States of America, as then existing, that, in case the annual conferences in the slaveholding States should find it necessary to unite in a distinct ecclesiastical connection, the ministers, local and travelling, of every grade and office, in the Methodist Episcopal Church, might attach themselves to such new ecclesiastical connection, without blame.

2. That the said annual conferences in the slaveholding States did find and determine that it was right, expedient, and necessary to erect the annual conferences last aforesaid into a distinct ecclesiastical connection, based upon the discipline of the Methodist Episcopal Church aforesaid, comprehending the doctrines and entire moral and ecclesiastical rules and regulations of the said discipline, (except only in so far as verbal alterations might be necessary to, or for a distinct organization,) which new ecclesiastical connection was to be known by the name and style of the Methodist Episcopal Church South; and that the Methodist Episcopal Church South was duly organized under said resolutions of the said General Conference, and the said decision of said annual conferences last aforesaid, in a convention thereof held at Louisville, in the State of Kentucky, in the month of May, in the year of our Lord one thousand eight hundred and forty-five.

3. That, by force of the said resolutions of June the eighth, eighteen hundred and forty-four, and of the authority and power of the said General Conference of the Methodist Episcopal Church as then existing, by which the same were adopted, and by virtue of the said finding and determination of the said annual conferences in the

slaveholding States therein mentioned, and by virtue of the [* 311] organization of such conferences into a * distinct ecclesiastical connection as last aforesaid, the religious association known as the Methodist Episcopal Church in the United States of America as then existing, was divided into two associations or distinct Methodist Episcopal churches, as in the bill of complaint is alleged.

4. That the property denominated the Methodist Book Concern at Cincinnati, in the pleadings mentioned, was, at the time of said division, and immediately before, a fund subject to the following use — that is to say, that the profits arising therefrom, after retaining a sufficient capital to carry on the business thereof, were to be regularly applied towards the support of the deficient travelling, supernumerary, superannuated, and worn-out preachers of the Methodist Episcopal Church, their wives, widows, and children, according to the rules and discipline of said church; and that the said fund and property are held under the act of incorporation in the said answer mentioned, by the said defendants, Leroy Swormstedt and John H. Power, as agents of said Book Concern, and in trust for the purposes thereof.

5. That, in virtue of the said division of said Methodist Episcopal Church in the United States, the deficient, travelling, supernumerary, superannuated, and worn-out preachers, their wives, widows, and children comprehended in, or in connection with, the Methodist Episcopal Church South, were, are, and continue to be beneficiaries of the said Book Concern to the same extent, and as fully as if the said division had not taken place, and in the same manner and degree as persons of the same description who are comprehended in, or in connection with, the other association, denominated since the division of the Methodist Episcopal Church; and that as well the principal as the profits of said Book Concern, since said division, should of right be administered and managed by the respective general and annual conferences of the said two associations and churches, under the separate organizations thereof, and according to the shares or proportions of the same as hereinafter mentioned, and in conformity with the rules and discipline of said respective associations, so as to carry out the purposes and trusts aforesaid.

6. That so much of the capital and property of said Book Concern at Cincinnati, wherever situate, and so much of the produce and profits thereof as may not have been heretofore accounted for to said church south, in the New York case hereinafter mentioned, or otherwise, shall be paid to said church south, according to the rate and proportions following, that is to say, in respect to the capital, such share or part, as corresponds with the proportion which the

number of the travelling *preachers in the annual con- [* 312] ferences which formed themselves into the Methodist Episcopal Church South, bore to the number of all the travelling preachers of the Methodist Episcopal Church before the division thereof, which numbers shall be fixed and ascertained as they are shown by the minutes of the several annual conferences next preceding the said division and new organization in the month of May, A. D. eighteen hundred and forty-five.

And in respect to the produce or profits, such share or part as the number of annual conferences which formed themselves into the Methodist Episcopal Church South bore, at the time of said division, in May, A. D. 1845, to the whole number of annual conferences then being in the Methodist Episcopal Church, excluding the Liberia Conference; so that the division or apportionment of said produce and profits shall be had by conferences, and not by numbers of the travelling preachers.

7. That said payment of capital and profits, according to the ratios of apportionment so declared, shall be made and paid to the said Smith, Parsons, and Green, as commissioners aforesaid, or their successors, on behalf of said church south and the beneficiaries therein, or to such other person or persons as may be thereto authorized by the General Conference of said church south, the same to be subsequently managed and administered so as to carry out the trusts and uses aforesaid, according to the discipline of said church south, and the regulations of the General Conference thereof.

8. And in order more fully to carry out the matters hereinbefore settled and adjudged, it is further ordered and decreed, that this cause be remanded to the said circuit court for further proceedings — that is to say,

That the same be referred to a master to take and state an account as follows:—

1. Of the amount and value of the said Book Concern at Cincinnati, on the first day of May, 1845, and of what specific property and effects (according to a general description or classification thereof) the same then consisted, whether composed of real or personal estate, and of whatever nature or description the same may have been; and a similar account as of the date or time when the said master shall take this account.

2. Of the produce and profits of said Book Concern, from the time of the General Conference of May, 1844, as reported thereto, (if so reported,) up to the time of the said division in May, 1845, and from the last-mentioned date down to the time of making up his report: specifying how much of said profits and produce have been trans-

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ferred to said Book Concern, at New York, and accounted [* 313] for to said church south in the * settlement of the case there ; and how much remains to be accounted for to said church south on the basis settled by this decree.

And in taking said accounts, and in the execution of said reference, the said defendants shall produce, on oath, all deeds, accounts, books of account, instruments, reports, letters, and copies of letters, memoranda, documents, and writings, whatever pertinent to said reference, in their possession or control, and the said defendants may be examined, on oath, on the said reference ; and each party may produce evidence before the master, and have process to compel the attendance of witnesses.

And the said master is further directed, in respect to any annual profits of said concern, not heretofore accounted for to said church south, to allow to said church south interest at the rate of 6 per cent. upon such unpaid balances from the date at which the same ought to have been paid.

And in respect to all the costs in this case, including the costs of the reference, and all other costs from the commencement of the case until its conclusion, and in respect to the fees of counsel and solicitors therein, of both parties, so far as the same may be reasonable, and in respect of just and necessary expenses, as well of plaintiffs as of defendants in conducting the suit, the same ought to be paid out of said Book Concern, and a common charge thereon, before apportionment and division, and the master is accordingly directed to allow and pay the same to the respective parties entitled thereto, and then to apportion the residue according to the principles fixed in this decree.

And the master is further directed to return his report to the said circuit court with all convenient despatch, which court shall then proceed to enforce the payment of whatever sum or sums may be found due to said church south, on the confirmation of the master's report, in such instalments as may be by said court adjudged reasonable, each party having due opportunity of excepting to the master's report ; and all questions arising upon said report, and not settled by this decree, may be moved before said circuit court, to which court either party shall be at liberty to apply on the footing of this decree.

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ALEXANDER J. MARSHALL, Plaintiff in Error, v. THE BALTIMORE AND OHIO RAILROAD COMPANY.

16 H. 314.

The jurisdiction of the circuit courts of the United States where a corporation is a party, re-examined and held to attach, where the averment on the record shows that a citizen of one State sues a corporation, created by the legislature of another State.

All contracts for a contingent compensation for obtaining legislation, or to use personal, or any secret, or sinister influence on legislators, are void.

Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use such secrecy, or voluntarily does use it, he cannot have the aid of a court to recover compensation.

What, in the technical language of politicians, is denominated "log rolling," is a misdemeanor at common law, punishable by indictment.

THE case is stated in the opinion of the court.

Davis and *Schley*, for the plaintiff.

Latrobe and *Johnson*, contra.

* GRIER, J., delivered the opinion of the court. [* 325]

A question, necessarily preliminary to our consideration of the merits of this case, has been brought to the notice of the court, though not argued or urged by the counsel.

The plaintiff in error, who was also plaintiff below, avers in his declaration that he is a citizen of Virginia, and that "The Baltimore and Ohio Railroad Company, the defendant, is a body corporate by an act of the general assembly of Maryland." It has been objected, that this averment is insufficient to show jurisdiction in the courts of the United States over the "suit" or "controversy." The decision of this court in the case of *The Louisville Railroad v. Letson*, 2 How. 497, it is said, does not sanction it, or, if some of the doctrines advanced should seem so to do, they are extrajudicial, and therefore not authoritative.

The published report of that case (whatever the fact may have been) exhibits no dissent to the opinion of the court by any member of it. It has, for the space of ten years, been received by the bar as a final settlement of the questions which have so frequently arisen under this clause of the constitution; and the practice and forms of pleading in the courts of the United States have been conformed to it. Confiding in its stability, numerous controversies, involving property and interests to a large amount, have been heard and decided by the circuit courts, and by this court; and many are still pending here, where the jurisdiction has been assumed on the faith of the sufficiency of such an averment. If we should now declare these judgments to have been entered without jurisdiction or authority, we should inflict

a great and irreparable evil on the community. There are no cases, where an adherence to the maxim of *stare decisis* is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts. For this reason alone, even if the court were now of opinion that the principles affirmed in the case [* 326] just mentioned, and that of *The Bank v. Deveaux, 5 Cranch, 61, were not founded on right reason, we should not be justified in overruling them. The practice founded on these decisions, to say the least, injures or wrongs no man; while their reversal could not fail to work wrong and injury to many.

Besides the numerous cases, with similar averments, over which the court have exercised jurisdiction without objection, we may mention that of Rundle v. The Delaware and Raritan Canal, 14 How. 80, as one precisely in point with the present. The report of that case shows that the question of jurisdiction, though not noticed in the opinion of the court, was not overlooked, three of the judges having severally expressed their opinion upon it. Its value as a precedent is therefore not merely negative. But as we do not rely only on precedent to justify our conclusion in this case, it may not be improper, once again, to notice the argument used to impugn the correctness of our former decisions, and also to make a brief statement of the reasons which, in our opinion, fully vindicate their propriety.

By the constitution, the jurisdiction of the courts of the United States is declared to extend, *inter alia*, to "controversies between citizens of different States." The judiciary act¹ confers on the circuit courts jurisdiction "in suits between a citizen of the State where the suit is brought and a citizen of another State."

The reasons for conferring this jurisdiction on the courts of the United States, are thus correctly stated by a contemporary writer (Federalist, No. 80.) "It may be esteemed as the basis of the Union, 'that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.' And if it be a just principle, that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens."

Now, if this be a right, or privilege guaranteed by the constitution to citizens of one State in their controversies with citizens of another, it is plain that it cannot be taken away from the plaintiff by any legislation of the State in which the defendant resides. If A, B, and C, with other dormant or secret partners, be empowered to act by

¹ 1 Stats. at Large, 73.

their representatives, to sue or to be sued in a collective or corporate name, their enjoyment of these privileges, granted by state authority, cannot nullify this important right conferred on those who contract with them. It was *well remarked by Mr. Justice [* 327] Catron, in his opinion delivered in the case of Rundle, already referred to, that "if the United States courts could be ousted of jurisdiction, and citizens of other States be forced into the state courts, without the power of election, they would often be deprived, in great cases, of all benefit contemplated by the constitution; and in many cases be compelled to submit their rights to judges and juries who are inhabitants of the cities where the suit must be tried, and to contend with powerful corporations, where the chances of impartial justice would be greatly against them; and where no prudent man would engage with such an antagonist, if he could help it. State laws, by combining large masses of men under a corporate name, cannot repeal the constitution. All corporations must have trustees and representatives, who are usually citizens of the State where the corporation is created: and these citizens can be sued, and the corporate property charged by the suit. Nor can the courts allow the constitutional security to be evaded by unnecessary refinements, without inflicting a deep injury on the institutions of the country."

Let us now examine the reasons which are considered so conclusive and imperative, that they should compel the court to give a construction to this clause of the constitution, practically destructive of the privilege so clearly intended to be conferred by it.

"A corporation, it is said, is an artificial person, a mere legal entity, invisible and intangible."

This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity "cannot be a citizen" is a logical conclusion from the premises which cannot be denied.

But a citizen who has made a contract, and has a "controversy" with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name. But these important faculties, conferred on them by state legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is

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not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather soph-
[*328] ism, which deals subtly with *words and names, without regard to the things or persons they are used to represent.

Nor is it reasonable that representatives of numerous unknown and ever-changing associates should be permitted to allege the different citizenship of one or more of these stockholders, in order to defeat the plaintiff's privilege. It is true that these stockholders are corporators, and represented by this "juridical person," and come under the shadow of its name. But for all the purposes of acting, contracting, and judicial remedy, they can speak, act, and plead, only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs. The individual or personal appearance of each and every corporator would not be a compliance with the exigency of the writ of summons or *distringas*. Though, nominally, they are not really parties to the suit or controversy. In courts of equity, where there are very numerous associates having all the same interest, they may plead and be impleaded through persons representing their joint interests; and, as in the case between the northern and southern branches of the Methodist Church, lately decided by this court, the fact that individuals adhering to each division were known to reside within both States of which the parties to the suit were citizens, was not considered as a valid objection to the jurisdiction.

In courts of law, an act of incorporation and a corporate name are necessary to enable the representatives of a numerous association to sue and be sued. "And this corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation." *Bank of Augusta v. Earle*, 13 Pet. 519. The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicile as against those who are compelled to seek them there, and can find them there and nowhere else. If it were otherwise, it would be in the power of every corporation, by electing a single director residing in a different State, to deprive citizens of other States with whom they have controversies, of this constitutional privilege, and compel them to resort to state tribunals in cases in which, of all others, such privilege may be considered most valuable.

But it is contended that, notwithstanding the court, in deciding the question of jurisdiction, will look behind the corporate or 'collective name given to the party, to find the persons who [*329] act as the representatives, curators, or trustees, of the association, stockholders, or *cestui que trusts*, and in such capacity are the real parties to the controversy; yet that the declaration contains no sufficient averment of their citizenship. Whether the averment of this fact be sufficient in law, is merely a question of pleading. If the declaration sets forth facts from which the citizenship of the parties may be presumed or legally inferred, it is sufficient. The presumption arising from the *habitat* of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it, the allegation that the "defendants are a body corporate by the act of the general assembly of Maryland," is a sufficient averment that the real defendants are citizens of that State. This form of averment has been used for many years. Any established form of words used for the expression of a particular fact, is a sufficient averment of it in law. In the case of *Gassies v. Ballou*, 6 Pet. 761, the petition alleged that "the defendant had caused himself to be naturalized an American citizen, and that he was, at the time of filing the petition, residing in the parish of West Baton Rouge." This was held to be a sufficient averment that he was a citizen of the State of Louisiana. And the court say: "A citizen of the United States, residing in any State of the Union, is a citizen of that State." They also express their regret that previous decisions of this court had gone so far in narrowing and limiting the rights conferred by this article of the constitution. And we may add, that instead of viewing it as a clause conferring a privilege on the citizens of the different States, it has been construed too often, as if it were a penal statute, and as if a construction which did not adhere to its very letter without regard to its obvious meaning and intention, would be a tyrannical invasion of some power supposed to be secured to the States or not surrendered by them.

The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers, and the combined wealth wielded by corporations in almost every State. It is of importance also to corporations themselves that they should enjoy the same privileges, in other States, where local prejudices or jealousy might injuriously affect them.

With these remarks on the subject of jurisdiction, we will now pro-

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ceed to notice the various exceptions to the rulings of the court on the trial.

The declaration, besides a count for work and labor done [*330] and *services rendered in procuring certain legislation in Virginia, demands the sum of \$50,000 on a special contract made with the defendants, through a committee of the board of directors, dated 12th of December, 1846, as follows:—

“ On motion, it was resolved, that the president be and is hereby authorized, in addition to the agent heretofore employed by the committee for the same purpose, to employ and make arrangements, with other responsible persons, to attend at Richmond during the present session of the legislature, in order to superintend and further any application or other proceeding to obtain the right of way through the State of Virginia, on behalf of this company, and to take all proper measures for that purpose; that he also be authorized to agree with such agent or agents, in case a law shall be obtained from the said legislature, during its present session, authorizing the company to extend their road through that State to a point on the Ohio River as low down the river as Fishing Creek; and the stockholders of this company shall afterwards accept such law as may be obtained, and determine to act under it; or, in case a law should be passed authorizing the construction of a railroad from any point on the Ohio River above the mouth of the Little Kenawha and below the city of Wheeling, with authority to intersect with the present Baltimore and Ohio Railroad; and the stockholders of the Baltimore and Ohio Railroad Company shall determine to accept and adopt said law, or shall become the proprietors thereof, and prosecute their road according to its provisions, then, in either of the said cases, the president shall be and is authorized to pay to the agent or agents whom he may employ in pursuance of this resolution, the sum of \$50,000, in the six per cent. bonds of this company, at their par value, and to be made payable at any time within the period of five years. Resolved, That it shall be expressly stipulated in the agreement with the said agent or agents employed pursuant to this resolution, and as a condition thereof, that if no such law as aforesaid shall pass, or if any law that may be passed shall not be accepted, or adopted, or used by the stockholders, the said agents shall not be entitled to receive any compensation whatever for the service they may render in the premises, or for any expense they may incur in obtaining such law or otherwise.”

And also the following resolution of January 18, 1847:—

“ On motion, it was unanimously resolved, that the right of Mr. Marshall to the compensation under the existing contract shall attach upon the passage of a law at the present session of the legislature

giving the right of way to Parkersburg or to Fishing Creek, either to The Baltimore and Ohio Railroad Company, or to an independent company: Provided this company * accept the one, [* 331] and adopt and act under the other, as contemplated by the contract.”

And also a letter from the president of the company, of February 11, 1847, containing a further modification of the terms as exhibited in the following extract:—

“In this crisis, if after the utmost exertion nothing better can be done, if it were practicable to pass Mr. Hunter’s substitute with Fish Creek instead of Fishing Creek, we would not undertake to prevent the passage of such a law. We would then refer the whole question to the stockholders; and I am authorized to say that, every thing else failing, if such a law as is indicated pass, and the stockholders adopt it and act under it in the manner contemplated by the contract, your compensation shall apply to that as to any other aspect of the case.”

The defendants gave notice of the following grounds of defence, as those upon which they intended to rely:—

“1. That the agreement sought to be enforced by the plaintiff, admitting his ability to make it out by legal proof to the extent of his pretensions, was an agreement contrary to the policy of the law, and which cannot be sustained.

“2. That, admitting the said agreement to be a valid one, which the courts would enforce, yet the plaintiff is not entitled to recover because he failed to accomplish the object for which it was entered into.

“3. That the law of Virginia, which was accepted by the defendants after it had been modified by the waiver of the city of Wheeling, as mentioned in the plaintiff’s notice, was not obtained through the efforts of the plaintiff, but against his strenuous opposition, and furnishes him no ground for his present claim.

“4. That there was a final settlement between the plaintiff and defendants, after the passage of the Virginia law aforesaid, which concludes him on this behalf.”

On the trial the plaintiff, after giving in evidence the contract as above stated, produced various letters and documents tending to show the measures pursued and their result—a particular recapitulation of these facts is not necessary, and would encumber the case. A very brief outline will suffice to an understanding of the points to be considered.

It appears that the defendants were desirous to obtain, from the legislature of Virginia, the grant of a right of way, so as to strike the Ohio River as low down as possible in view of a connection from thence towards Cincinnati. It was the interest of the people of

Wheeling to prevent, if possible, the terminus of the road on the Ohio from being anywhere else but at their city. In the [* 332] winter of 1846-7, the antagonist parties came into * collision again before the legislature of Virginia, at Richmond. In this contest, the plaintiff acted as general agent of the defendants, under the contract in question. The bills granting the desired franchise to the defendants were defeated in every form proposed by them, and a substitute altered and amended to suit the interests of Wheeling, was finally passed in face of the strenuous opposition of the defendants.

The plaintiff afterwards admitted his defeat, and want of success in fulfilling the conditions of his contract. He at the same time demanded and received the sum of \$600 for expenses of agents, &c. But as Wheeling and defendants both desired the extension of the road to the Ohio, they finally agreed to a compromise, modifying the operation of the act under which the road has since been completed.

The defendants then offered in evidence, in support of their defence, on the ground of illegality of the contract, a letter from the plaintiff to the president of the board, dated 17th November, 1846, with an accompanying document, in which plaintiff proposes himself as agent, and states his terms; and the course he advises to be pursued, and the means to be used to insure success; and also a letter from the president in answer thereto, stating his inability to act on his individual responsibility, and inviting an interview; together, also, with a letter from the same, dated 12th of December, in which he says: "I am now prepared to close an arrangement with you on the basis of your communication of the 17th of November."

The plaintiff's objection to the admission of these documents in evidence, and the reception of them, form the subject of the first bill of exceptions.

In order to judge of the competency and relevancy of these documents to the issue in the case, it will be necessary to give a brief statement of some portion of their contents.

The letter of November 17, commences by referring to a former interview and a promise to submit a plan, in writing, by which it was supposed the much desired right of way through Virginia might be procured from the legislature. It proposes that the writer should be appointed, as agent of the company, to manage "the delicate and important trust." It states that, as the business required "absolute secrecy," he could not safely get testimonials as to his qualifications; but that he had "considerable experience as a lobby member" before the legislature of Virginia, and could allege "an ostensible reason" for

his presence in Richmond, and his active interference, without disclosing his real character and object.

The accompanying document explains the cause of previous failures, and shows what remedy or counteracting influence "should be employed. It announces that "log-rolling" was [* 333] the principal measure used to defeat them before. That it has grown into a system ; that however "skilful and unscrupulous" the friends of defendants may have been in this respect, still, their opponents had got the advantage, being present on the ground, and "using out-door influence." That it was necessary to meet their opponents with their own weapons. That the mass of the members of the legislature were "careless and good-natured," and "engaged in idle pleasures," capable of being "moulded like wax" by the "most pressing influences." That, to get the vote of this careless mass, "efficient means" must be adopted. That through their "kind and social dispositions" they may be approached and influenced to do any thing not positively wrong, "where they can act without fear of their constituents." That to the accomplishment of success it was necessary to have "an active, interested, and well-organized influence about the house." That these agents "must be inspired with an earnest, nay, anxious wish for success," "and have their whole reward depending on it." "Give them nothing if they fail, endow them richly if they succeed." "Stimulate them to active partisanship by the strong lure of high profit."

That, in order to the "requisite secrecy," the company should know but one agent, and he select the others; that the cost of all this will "necessarily be great," as the result can be obtained "only by offers of high contingent compensation;" that "high services cannot be had at a low bid," and that he would not be willing to undertake the business unless "provided with a fund of at least \$50,000."

As the contract was made "on the basis of this communication," there can be no doubt as to its legal competence as evidence to show the nature and object of the agreement. As parts of one and the same transaction, they may be considered as incorporated in the contract declared on. The testimony is therefore competent. Is it relevant?

As the first three propositions, contained in the charge of the court, have reference to the question of the relevancy of this matter to the issues, they may well be considered together.

They are as follows:—

"1. If at the time the special contract was made, upon which this suit is brought, it was understood between the parties that the services of the plaintiff were to be of the character and description set

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forth in his letter to the president of the railroad company, dated November 17, 1846, and the paper therein inclosed, and that, in consideration of the contingent compensation mentioned in the contract, he was to use the means and influences proposed in [* 334] his letter and the accompanying paper, * for the purpose of obtaining the passage of the law mentioned in the agreement, the contract is against the policy of the law, and no action can be maintained.

“ 2. If there was no agreement between the parties that the services of the plaintiff should be of the character and description mentioned in his letter and communication referred to in the preceding instruction, yet the contract is against the policy of the law, and void, if at the time it was made the parties agreed to conceal from the members of the legislature of Virginia the fact that the plaintiff was employed by the defendant, as its agent, to advocate the passage of the law it desired to obtain, and was to receive a compensation, in money, for his services, in case the law was passed by the legislature at the session referred to in the agreement.

“ 3. And if there was no actual agreement to practise such concealment, yet he is not entitled to recover if he did conceal from the members of the legislature, when advocating the passage of the law, that he was acting as agent for the defendant, and was to receive a compensation, in money, in case the law passed.”

It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal ; or which is inconsistent with sound morals or public policy ; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. • Hence all contracts to evade the revenue laws are void. Persons entering into the marriage relation should be free from extraneous or deceptive influences ; hence the law avoids all contracts to pay money for procuring a marriage. It is the interest of the State that all places of public trust should be filled by men of capacity and integrity, and that the appointing power should be shielded from influences which may prevent the best selection ; hence the law annuls every contract for procuring the appointment or election of any person to an office. The pardoning power, committed to the executive, should be exercised as free from any improper bias or influence as the trial of the convict before the court ; consequently, the law will not enforce a contract to pay money for soliciting petitions or using influence to obtain a pardon. Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every

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act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.

All persons whose interests may in any way be affected by "any public or private act of the legislature, have an un- [* 335] doubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, openly and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practising deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent "stimulated to active partisanship by the strong lure of high profit." Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.

Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinaacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

Influences secretly urged under false and covert pretences must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are "proper means;" and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or "careless" members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the

elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capital of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome—*omne Romæ venale*.

[* 336] * That the consequences we deprecate are not merely visionary, the act of congress of 1853,¹ c. 81, "to prevent frauds upon the treasury of the United States" may be cited as legitimate evidence. This act annuls all champertous contracts with agents of private claims.

2. It forbids all officers of the United States to be engaged as agents or attorneys for prosecuting claims or from receiving any gratuity or interest in them in consideration of having aided or assisted in the prosecution of them, under penalty of fine and imprisonment in the penitentiary.

3. It forbids members of congress, under a like penalty, from acting as agents for any claim in consideration of pay or compensation, or from accepting any gratuity for the same.

4. It subjects any person who shall attempt to bribe a member of congress to punishment in the penitentiary, and the party accepting the bribe to the forfeiture of his office.

If severity of legislation be any evidence of the practice of the offences prohibited, it must be the duty of courts to take a firm stand, and discountenance, as against the policy of the law, any and every contract which may tend to introduce the offences prohibited.

Nor are these principles now advanced for the first time. Whenever similar cases have been brought to the notice of courts they have received the same decision.

Without examining them particularly, we would refer to the cases of *Fuller v. Dame*, 18 Pick. 472; *Hatzfield v. Gulden*, 7 Watts, 152; *Clippinger v. Hepbaugh*, 5 Watts & Serg. 315; *Wood v. M'Can*, 6 Dana, 366; and *Hunt v. Test*, 8 Alabama, 719. *The Commonwealth v. Callaghan*, 2 Virginia Cases, 460.

The sum of these cases is: 1. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of the law.

2. Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use secret influences, or voluntarily, without contract with his principal, uses such means, he cannot have the assistance of a court to recover compensation.

¹ 10 Stats. at Large, 170.

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3. That what, in the technical vocabulary of politicians is termed "log-rolling," is a misdemeanor at common law, punishable by indictment.

It follows, as a consequence, that the documents given in evidence under the first bill of exceptions were relevant to the issue; and that the court below very properly gave the instructions under consideration.

* We now come to the last three exceptions to the in- [*337] instructions of the court, which were as follows:—

"4. But if the contract was made upon a valid and legal consideration, the contingency has not happened upon which the sum of fifty thousand dollars was to be paid to the plaintiff—the law passed by the legislature of Virginia being different in material respects, from the one proposed to be obtained by the defendant by the agreement of February 11, 1847; and the passage of which, by the terms of that contract, was made a condition precedent to the payment of the money."

"5. The subsequent acceptance of the law as passed, under the agreement with the city of Wheeling, stated in the evidence, was not a waiver of the condition, and does not entitle the plaintiff to recover in an action on the special contract."

"6. There is no evidence that the plaintiff rendered any services, or was employed to render any, under any contract, express or implied, except the special contract stated in his declaration; and as no money is due to him, under that contract, he cannot recover upon the count of *quantum meruit*."

We do not think it necessary, in order to justify these instructions of the court below, or to vindicate our affirmance of them, to enter into a long and perplexed history of the various schemes of legislative action, and their results, as exhibited by the testimony in the case. It would require a map of the country, and tedious and prolix explanations. Suffice it to say, that after a careful examination of the admitted facts of the case, we are fully satisfied of the correctness of the instructions.

1. Because the plaintiff, by his own showing, had not performed the conditions which entitled him to demand this stipulated compensation.

2. The act of assembly which was passed, and afterwards used by defendant for want of better, was obtained by the opponents of defendants, and in spite of the opposition of plaintiff; and the fact that the company were compelled to accept the act under modifications, by compromise with their opponents, would not entitle plaintiff to his stipulated reward.

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3. By the stipulations of his contract he is estopped from claiming under a *quantum meruit*, as his whole compensation depended on success in obtaining certain specified legislation, which he acknowledged he had failed to achieve.

The judgment of the circuit court is, therefore, affirmed, with costs.

Catron, J., Daniel, J., and Campbell, J., dissented.

[* 338] CATRON, J., said that he concurred with his brother, * Mr. Justice Campbell, in the opinion which he was about to pronounce, and had authorized him so to state. But inasmuch as reference had been made in the opinion of the court, which had just been delivered, to an opinion which he himself had given in the case of *Bundle v. The Delaware and Raritan Canal Company*, 14 How. 80, he felt it to be a duty to himself to remark, that he had at all times denied that a corporation is a citizen within the sense of the constitution, and so he had declared in the opinion just referred to. He had there stated the necessity of the existence of jurisdiction in the federal courts as against corporations, but held that citizenship of the president and directors must be averred to be of a different State from the other party to the suit; without which averment, this court could not proceed, according to the settled practice of fifty years standing. Letson's case, 2 How. 497, (which is the foundation of the new doctrine,) contained the necessary averment within the settled practice, and consequently it was not necessary to give a separate opinion in that case.

He remarked, further, that according to the assumption that a corporation was a citizen of the State where it was incorporated, a company having a charter for a railroad in two States (and there were many such) might sue citizens of the State and place where the president and directors resided, averring that the company was a citizen of the other State, and *vice versa*. In such case the corporation could sue in every federal court in the Union.

DANIEL, J. From the opinion just delivered, I must declare my dissent. In the settlement of the discreditable controversy between the parties to this cause, I take no part. If I did, I should probably say that it is a case without merits, either in the plaintiff or in the defendants, and that in such a case they should be dismissed by courts of justice to settle their dispute by some standard which is cognate to the transaction in which they have been engaged.

My participation in this case has reference to a far different and more important ingredient involved in the opinion just announced,

namely, the power of this court to adjudicate this cause consistently, with a just obedience to that authority from which, and from which alone, their being and their every power are derived.

Having in former instances, and particularly in the case of *Rundle v. The Delaware and Raritan Canal Company*, endeavored to expose the utter want of jurisdiction in the courts of the United States over causes in which corporations shall be parties either as * plaintiffs or defendants, I hold it to be unnecessary in this [* 339] place to repeat or to enlarge upon the positions maintained in the case above mentioned, as they are presented in 14 How. 95. Indeed, from any real necessity for enforcing the general fundamental proposition contended for by me in the case of *Rundle and the Delaware and Raritan Canal Company*, namely, that under the second section of the third article of the constitution, citizens only, that is to say men, material, social, moral, sentient beings, must be parties, in order to give jurisdiction to the federal courts, I am wholly relieved by the virtual, obvious, and inevitable concessions, comprised in the attempt now essayed, to carry the provision of the constitution beyond either its philological, technical, political, or vulgar acceptance. For in no one step in the progress of this attempt, is it denied that a corporation is not and cannot be a citizen, nor that a citizen does not mean a corporation, nor that the assertion of a power by an individual outside of the corporation, and interfering with and controlling its organization and functions, (whatever might be the degree of interest owned by that individual in the corporation,) would be incompatible with the existence of the corporate body itself. Nothing of this kind is attempted. But an effort is made to escape from the effect of these concessions, by assumptions which leave them in all their force, and show that such concessions and assumptions cannot exist in harmony with each other.

Thus it has been insisted that a corporation, created by a State, can have no being or faculties beyond the limits of that State; and if its president and officers reside within that State, such a conjuncture will meet and satisfy the predicament laid down by the constitution.

The want of integrity, in this argument, is exposed by the following questions:—

1. Does the restriction of the corporate body within particular geographical limits, or the residence of its officers within those limits, render it less a corporation, or alter its nature and legal character in any degree?

2. Does the restriction of the corporate faculties within given bounds, necessarily or by any reasonable presumption, imply that the interest of its stockholders, either in its property or its acts, is

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confined to the same limits? If it does, then a change of residence by officers, agents, or stockholders, or a transfer of a portion of the interests of the latter, would destroy the qualification of citizenship depending upon locality. If it would not have this effect, then this anomalous citizen may possess the rights of both plaintiff and defendant, nay, by a sort of plural being or ubiquity, may be a [* 340] citizen of every State in the Union, * may even be a State and a citizen of the same State at the same time.

Again, it has been said, that the constitution has reference merely to the interests of those who may have access to the federal courts; and that provided those interests can be traced, or presumed to have existence in persons residing in different States, it cannot be required that those by whom such interests are legally held and controlled, or represented, should be alleged or proved to be citizens, or should appear in that character as parties upon the record. In reply to this proposition, it may be asked, upon what principle any one can be admitted into a court of justice apart from the interest he may possess in the matter in controversy; and whether it is not that interest alone, and the position he holds in relation thereto, which can give him access to any court? But, again, the language of the constitution refers expressly and conclusively to the civil or political character of the party litigant, and constitutes that character the test of his capacity to sue or be sued in the courts of the United States.

In strict accordance with this doctrine has been the interpretation of the constitution from the early, and what may in some sense be called the contemporaneous interpretation of that instrument, an interpretation handed down in an unbroken series of decisions, until crossed and disturbed by the anomalous ruling in the case of *Letson v. The Louisville Railroad Company*.

Beginning with the case of *Bingham v. Cabot*, in the 3d of Dallas, 382, and running through the cases of *Turner v. The Bank of North America*, 4 Dallas, 8; *Turner's Admr. v. Enrille*, *ibid.* 7; *Mossman v. Higginson*, *ibid.* 12; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Wood v. Wagon*, 2 *ibid.* 1; *Capron v. Van Noorden*, 2 *ibid.* 126; *Strawbridge v. Curtis*, 3 *ibid.* 267; *The Bank of the United States v. Deveaux*, 5 *ibid.* 61; *Hodgson v. Bowerbank*, 5 *ibid.* 303; *The Corporation of New Orleans v. Winter*, 1 Wheat. 91; *Sullivan v. The Fulton Steamboat Company*, 6 Wheat. 450 — the doctrine is ruled and reiterated, that in order to maintain an action in the courts of the United States, under the clause in question, not only must the parties be citizens of different States, but that this character must be averred explicitly, and must appear upon the record, and cannot be inferred from residence or locality, however expressly stated, and that

the failure to make the required averment will be fatal to the jurisdiction of a federal court, either original or appellate; and is not cured by the want of a plea or of a formal exception in any other form. But the decisions have not stopped at this point; they have ruled that, to come within the meaning of the constitution, the cause of action * must have existed *ab origine* between [* 341] citizens of different States, and that the article in question cannot be evaded by a transfer of rights, which, by their primitive and intrinsic character, were not cognizable in the courts of the United States as between citizens of different States. See *Turner v. The Bank of North America*, already cited, and the cases of *Montalet v. Murray*, 4 Cranch, 46; and *Gibson v. Chew*, 16 Pet. 315. It is remarkable to perceive how perfectly the case of *Turner v. The Bank of North America* covers that now under consideration, and how strongly and emphatically it rebukes the effort to claim by indirect and violent construction, powers for the federal courts which not only have never been delegated to them, nor implied by the silence of the constitution, but still more, powers assumed in defiance of its express inhibition. In the case last mentioned, the plaintiffs were well described as citizens of Pennsylvania, suing Turner and others, who were properly described as citizens of North Carolina, upon a promissory note made by the defendants, and payable to Biddle and Company, and which, by assignment, became the property of the plaintiffs. Biddle and Co. were not otherwise described than as "using trade and partnership" at Philadelphia or North Carolina. Upon an exception upon argument, taken for the first time in this court, Ellsworth, Chief Justice, pronounced its decision in these words: "A circuit court is one of limited jurisdiction, and has cognizance not of causes generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is, (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears.

"This renders it necessary, inasmuch as the proceedings of no court can be valid further than its jurisdiction appears or can be presumed to set forth upon the record of a circuit court, the facts or circumstances which give it jurisdiction, either expressly or in such manner as to render them certain by legal intendment. Amongst those circumstances, it is necessary, where the defendant appears to be a citizen of one State, to show that the plaintiff is a citizen of some other State, or an alien; or if, as in the present case, the suit be upon a promissory note by an assignee, to show that the original promisee

is so, for by a special provision of the statute it is his description as well as that of the assignee, which effectuates the jurisdiction; but here the description given of the promisee only is, that he used trade at Philadelphia or North Carolina; which, taking either place for that where he used trade, contains no averment that he was a [*342] *citizen of a State other than that of North Carolina, or an alien, nor any thing which by legal intendment can amount to such an averment." Let it be remembered that the statute alluded to by Chief Justice Ellsworth is nothing more nor less than an assertion in terms of the second section of the third article of the constitution; and it may then be asked, what becomes of this awkward attempt to force upon both the constitution and statute a construction which the just meaning of both absolutely repels? Every one must be sensible that the seat of a man's business, of his daily pursuits and occupations, must probably, if not necessarily, be the place of his residence; yet here we find it expressly ruled that such a commorancy by no just legal intendment any more than by express language, constitutes him a citizen of that community or State in which he may happen to be then residing or transacting his business; moreover, it is familiar to every lawyer or other person conversant with history, that during the periods of greatest jealousy and strictness of the English polity, aliens were permitted, for the convenience and advancement of commerce, to reside within the realm, and to rent and occupy real property; but it never was pretended that such permission or residence clothed them with the character or with a single right pertaining to a British subject.

Nor has the doctrine ruled by the cases just cited been applied to proceedings at law alone, in which a peculiar strictness or an adherence to what may seem to partake of form is adhered to. The overruling authority of the constitution has been regarded by this court as equally extending itself to equitable as to legal rights and proceedings in the courts of the United States. Thus, in the case of *Course v. Stead*, in 4 Dallas, 22. That was a suit in equity in the circuit court of the United States for the district of Georgia, in which it was deemed necessary to make a new party by a supplemental bill. This last bill recited the original bill, and all the orders which had been made in the cause, but omitted to allege the citizenship of the newly made defendant. In this case, when brought here by appeal from the court below, this court say, in reference to the omission to aver the citizenship of the new party: "It is unnecessary to form or to deliver any opinion upon the merits of this cause; let the decree of the circuit court be reversed." The case of *Jackson v. Ashton*, in 8 Pet. 148, is still more in point. This also was a suit in equity. The

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caption of the bill was in these words : " Thomas Jackson and others, citizens of the State of Virginia, v. The Rev. William E. Ashton, a citizen of Pennsylvania." What said this court by its organ, Marshall, Chief Justice, upon this state of the case ? " The title or * caption of the bill is no part of the bill, and does not [* 343] remove the objection of the defects in the pleadings. The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction." In these last decisions must be perceived the most emphatic refutation of this newly assumed version of the constitution, which affirms that, although by the language of that instrument citizenship and neither residence nor property, but citizenship, the civil and political relation or *status* independently of either, is explicitly demanded, yet this requisition is fully satisfied by the presumption of a beneficiary interest in property apart either from possession or right of possession or from any legal estate or title, makes the interest thus inferred equivalent with citizenship of the person to whom interest is thus strangely imputed. Perhaps the most singular circumstance attending the interpolation of this new doctrine is the effort made to sustain it upon the rule *stare decisis*. After the numerous and direct authorities before cited, showing the inapplicability to this case of this rule, it would have been thought *à priori* that the very last aid to be invoked in its support would be the maxim *stare decisis*. For this new class of citizen corporations, incongruous as it must appear to every legal definition or conception, is not less incongruous nor less novel to the relation claimed for it, or rather for its total want of relation to the settled adjudications of this court. It is strictly a new creation, an alien and an intruder, and is at war with almost all that has gone before it, and can trace its being no further back than the case of *Letson v. The Louisville Railroad Company*.

The principle *stare decisis*, adopted by the courts in order to give stability to private rights, and to prevent the mischiefs incident to mutations for light and insufficient causes, is doubtless a wholesome rule of decision when derived from legitimate and competent authority, and when limited to the necessity which shall have demanded its application ; but, like every other rule, must be fruitful of ill when it shall be wrested to the suppression of reason or duty, or to the arbitrary maintenance of injustice, of palpable error, or of absurdity. Such an application of this rule must be necessarily to rivet upon justice, upon social improvement and happiness, the fetters of ignorance, of wrong, and usurpation. It is a rule which, whenever applied, should be derived from a sound discretion — a discretion having its origin in the regular and legitimate powers of those who assert it.

It can never be appealed to in derogation or for the destruction of the supreme authority — of that authority which created and which holds in subordination the agents whose functions it has defined, [* 344] and bounded by clear and plainly-marked limits. * Wherever the constitution commands, discretion terminates. Considerations of policy or convenience, if ever appealed to, I had almost said if ever imagined in derogation of its mandate, become an offence. Beyond the constitution, or the powers it invests, every act must be a violation of duty, an usurpation.

There cannot be a more striking example than is instanced by the case before us, of the mischiefs that must follow from disregarding the language, the plain words, or what may be termed the body, the *corpus*, of the constitution, to ramble in pursuit of some *ignis fatuus* of construction or implication, called its spirit or its intention, — a spirit not unfrequently about as veracious, and as closely connected with the constitution, as are the spirits of the dead with the revolving tables and chairs, which, by a fashionable metempsychosis of the day, they are said to animate.

The second section of the third article of the constitution prescribes citizenship as an indispensable requisite for obtaining admission to the courts of the United States — prescribes it in language too plain for misapprehension. This court, in the case of Deveaux and the Bank of the United States, yielded obedience, professedly at any rate, to the constitutional mandate, for they asserted the indispensable requisite of citizenship; but in an unhappy attempt to reconcile that obedience with an unwarranted claim to power, they utterly demolished the legal rights, nay, the very existence of one of the parties to the controversy, thereby taking from that party all standing or capacity to appear in any court. This was *ignis fatuus* No. 1. This was succeeded by the case of Letson v. The Cincinnati and Louisville Railroad Company, in which, by a species of judicial resurrection, this party, the corporation, was *deterré*, raised up again, but was not restored to the full possession of life and vigor, or to the use of all his members and faculties, nor even allowed the privilege of his original name; but semi-animate, and in virtue of some rite of judicial baptism, though “curtailed of his natural dimensions,” he is rendered equal to a release from the thralldom of constitutional restriction, and made competent at any rate to the power of commanding the action of the federal courts. This is *ignis fatuus* No. 2. Next in order is the case of Marshall v. The Baltimore and Ohio Railroad Company. This is indeed the *chef d'œuvre* amongst the experiments to command the action of the spirit in defiance of the body of the constitution.

It is compelled, from the negation of that instrument, by some

necromantic influence, potent as that by which, as we read, the resisting Pythia was constrained to yield her vaticinations of an occult futurity. For in this case is manifested the most entire disregard of any and every qualification, political, [* 345] civil, or local. This company is not described as a citizen or resident of any State; nor as having for its members the citizens of any State; nor as a quasi citizen; nor as having any of the rights of a citizen; nor as residing or being located in any State, or in any other place. No intimation of its "whereabout" is alluded to. It is said to have been incorporated by the State of Maryland; but whether the State of Maryland had authority to fix its locality, or ever directed that locality, and whether that be in the moon or *in terra incognita*, is nowhere disclosed. It is said that because this company was incorporated by the legislature of Maryland, we may conjecture, and are bound to conjecture, that it is situated in Maryland, and must possess all the qualifications appertaining to a citizen of Maryland to sue or be sued in the courts of the United States; and this inference we are called upon to deduce in opposition to the pleadings, the proofs, and the arguments, all of which demonstrate that this corporation claims to extend its property, its powers, and operations, and of course its locality, over a portion of the State of Virginia, and that it was in reference to its rights and operations within the latter State, that the present controversy had its origin.

Thus does it appear to me that this court has been led on from dark to darker, until at present it is environed and is beacons on by varying and deceptive gleams, calculated to end in a deeper and more dense obscurity. In dread of the precipices to which they would conduct me, I am unwilling to trust myself to these rambling lights; and if I cannot have reflected upon my steps the bright and cheering day-spring of the constitution, I feel bound nevertheless to remit no effort to halt in what, to my apprehension, is the path that terminates in ruin. And in considering the tendencies and the results of this progress, there is nothing which seems to me more calculated to hasten them, than is the too evidently prevailing disposition to trench upon the barrier, which, in the creation by the several States of the federal government, they designed to draw around and protect their sovereign authority and their social and private rights; and to regard and treat with affected derision every effort to arrest any hostile approach, either indirectly or openly, to the consecrated precincts of that barrier. It is indeed a sad symptom of the downward progress of political morals, when any appeal to the constitution shall fail to "give us pause," and to suggest the necessity for solemn reflection. Still more fearful is the prevalence of the

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disposition, either in or out of office, to meet the honest or scrupulous devotion to its commands with a sneer, as folly unsuited to [*346] the times, and condemned by that * new-born wisdom which measures the constitution only by its own superior and infallible standard of policy and convenience. By the disciples of this new morality, it seems to be thought that the mandates or axioms of the constitution, when found obstructing the way to power, and when they cannot be overstepped by truth or logic, may be conveniently turned and shunned under the denomination of abstractions or refinements; and the loyal supporters of those mandates may be borne down under the reproach of a narrow prejudice of fanaticism incapable of perceiving through the letter, and in contradiction of the language of the charter, its true spirit and intent; and as being wholly behind the sagacity and requirements of the age.

We cannot, however, resist the disposition to ask of those whose expanded and more pervading view can penetrate beyond the palpable form of the charter, what it is they mean to convey by the term abstraction, which is found so well adapted to their purposes? We would, with becoming modesty, inquire whether every axiom or precept, either in politics or ethics, or in any other science, is not an abstraction? Whether truth itself, whether justice or common honesty is not an abstraction? And we would further ask those who so deal with what they call abstractions, whether they design to assail all general precepts and definitions as incapable of becoming the fixed and fundamental basis of rights or of duties. The philosophy of these expositions may easily embrace the rejection of the decalogue itself, and might be particularly effectual in reference to that injunction which forbids the coveting of all that appertains to our neighbor. The constitution itself is nothing more than an enumeration of general abstract rules, promulged by the several States, for the guidance and control of their creature or agent, the federal government, which for their exclusive benefit they were about to call into being. Apart from these abstract rules the federal government can have no functions and no existence. All its attributes are strictly derivative, and any and every attempt to transcend the foundations (those proscribed abstractions) on which its existence depends, is an attempt at anarchy, violence, and usurpation. Amongst the most dangerous means, perhaps, of accomplishing this usurpation, because its application is noiseless whilst it is persevering, is the habitual interference, for reasons entirely insufficient, by the federal authorities with the governments of the several States; and this too most commonly under the strange (I had almost called it the preposterous) pretext of guarding the people of the States against

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their own governments, constituted of, and administered by, their own fellow-citizens, bound to them by the sympathies arising from a community or identity of interests, *from intimate [* 347] intercourse, and selected by and responsible to themselves.

Or it may be said, under the excuse of protecting the people of the States against themselves, converting the federal government in reference to the States into one grand commission, *De lunatico inquirendo*. The effect of this practice is to reduce the people of the States and their governments under an habitual subserviency to federal power; and gives to the latter what ever has been and ever must be, the result of intervention by a foreign, a powerful, and interested mediator, the lion's share in every division. For myself, I would never hunt with the lion. I would anxiously avoid his path; and as far as possible keep him from my own; always bearing in mind the pregnant reply told in the Apologue as having been made to his gracious invitation to visit him in his lair; that although in the path that conducted to its entrance, innumerable footprints were to be seen, yet in the same path there could be discerned *Nulla vestigia retrorsum*. The vortex of federal encroachment is of a capacity ample enough for the ingulfing and retention of every power; and inevitably must a catastrophe like this ensue, so long as a justification of power, however obtained, and the end of every hope of escape or redemption can, to the sickening and desponding sense, in the iron rule of *stare decisis*, be proclaimed. A rule which says to us: "The abuse has been already put in practice; it has by practice, merely, become sanctified; and may therefore be repeated at pleasure." The promulgation of a doctrine like this, does indeed cut off all hope of redress, of escape, or of redemption, unless one may be looked for, however remote, in a single remedy — that sharp remedy to be applied by the true original sovereignty abiding with the States of this Union, namely, a reorganization of existing institutions, such as shall give assurance that if in their definition and announcement their rights can, by their appointed agents, be esteemed as abstractions merely, yet in the concrete, that is, in the exercise and enjoyment, those rights are real and substantive, and may neither be impaired nor denied.

My opinion is, that this cause should have been dismissed by the circuit court for want of jurisdiction, and should now be remanded to that court with instruction for its dismissal.

CAMPBELL, J. I dissent from that portion of the opinion of the court which affirms the jurisdiction of the circuit court in this case. The question involves a construction of a clause in the constitution,

and arises under circumstances which make it proper that I should record the reasons for the dissent.

[* 348] * The conditions under which corporations might be parties to suits in the courts of the United States, engaged the attention of this court not long after its organization. At the session of the court, in 1809, three cases exhibited questions of jurisdiction in regard to them, under three distinct aspects. The *Bank of the United States v. Deveaux*, was the case of a corporation plaintiff, whose corporators were described as citizens of Pennsylvania suing a citizen of Georgia in the federal court of that State. The case of *Wood v. Maryland Insurance Company*, was that of a corporation defendant, whose corporators were properly described, sued in the State of its charter. And the case of *Hope Insurance Company v. Boardman*, was that of a "legally incorporated body," sued in the State from which it derived its charter, and was "legally established," but of whose corporators there was no description. 5 Cranch, 57, 61, 78.

The cases were argued together by counsel of eminent ability, with preparation and care, and were decided by the court with much deliberation and solemnity. Chief Justice Marshall declared the opinion of the court to be "that the invisible, intangible, and artificial being, the mere legal entity, a corporation aggregate, is certainly not a citizen, and consequently cannot sue or be sued in the courts of the United States unless the rights of the members in this respect can be exercised in the corporate name." As it appeared in the two cases first mentioned, that the corporators might sue and be sued in the courts of the United States under the circumstances of the cases, the court on those cases treated them "as a company of individuals who, in transacting their joint concerns, had used a legal name," and for the reason "that the right of a corporation to litigate, depended upon the character (as to citizenship) of the members which compose it, and that a body corporate cannot be a citizen within the meaning of the constitution. The judgment in the last case was reversed for want of jurisdiction."

In *Sullivan v. Fulton Steamboat Company*, 6 Wheat. 450, the defendant was described as a body corporate, incorporated by the legislature of the State of New York, for the purpose of navigating, by steamboats, the waters of East River or Long Island Sound, in that State." This corporation was sued in New York. Upon appeal, this court determined that the circuit court had no jurisdiction of the defendant. In *Breithaupt v. The Bank of Georgia*, 1 Pet. 238, that corporation was sued in that State, but this court certified "that as the bill did not aver that the corporators of the

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Bank of Georgia are citizens of the State of Georgia, the circuit court had no jurisdiction of the case." In *The Vicksburg Bank v. Slocomb*, 14 Pet. 60, a corporation was sued by a citizen of a different State, in the State of its charter *but it [*349] appearing by plea, that two of its corporators were citizens of the same State as the plaintiff, this court declined jurisdiction for the federal tribunals. This was in accordance with the circuit decisions, 4 Wash. C. C. 597; 3 Sumn. 472; 1 Paine; and their doctrine was repeated in *Irvine v. Lowrey*, 14 Pet. 293. Such was the condition of the precedents in this court when, in 1844, the case of *Louisville Railroad Company v. Letson*, 2 How. 497, arose. The case was one of a New York plaintiff suing a South Carolina corporation, in that State, and describing its corporators as citizens. It appeared by plea, among other things, not material to the present discussion, "that two of the corporators were citizens of North Carolina."

In similar pleas, before this, it had appeared that the corporators belonged to the State of the adverse party, and consequently were within the exclusion of the 11th section¹ of the judiciary act of 1789. In the present case, the plaintiff was a citizen from a different State from these corporators. The court notices this fact as a peculiarity. "The point," they say, "has never before been under the consideration of this court. We are not aware that it ever occurred in either of the circuits until it was made in this case. It has not, then, been directly ruled in any case." The court proceeded then to decide that there was jurisdiction under the constitution, for the parties were citizens of different States, and that the judiciary act did not exclude it. Thus was this point in the plea disposed of, upon grounds which unsettled none of the cases before cited. The court avows this, and says: "That the case might be safely put upon these reasonings," conducted "in deference to the doctrines of former cases." It then proceeds: "But there is a broader ground, upon which we desire to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that a corporation created by, and doing business in a particular State, is to be deemed, to all intents and purposes, as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person."

Since the decision of *Letson's* case, there have been cases of corporations, suing in the federal courts beyond the State of their location, and suing and being sued in the State of their location, in which

1 1 Stats. at Large, 78.

this question might have been considered in this court. But there was no argument at the bar, and no notice of it in the opinion of the court. In one of these, one of the six judges who assisted in the decision of Letson's case, expressed strongly a disapprobation of its doctrine, while another limited the conclusions of the court to the decision of the case then before it. *Rundle v. Delaware Canal Company*, 14 How. 80.

The case of *The Indiana Railroad Company v. Michigan Railroad Company*, 15 How. 233, presented the question now before us, and at that time I was favorable to its reëxamination; but this was expressly waived by the court, and the case decided upon another question of jurisdiction.

In the case of the Methodist Church, there was but one corporation before the court as a party. The two corporators who composed that, were defendants in their corporate as well as individual capacity. The citizenship of all the parties to the record was legally declared; and the parties to the record legally represented all the interests of the voluntary association at issue. In reference to jurisdiction, Justice Washington says: "The cases of a voluntary association trustees, executors, partners, legatees, distributees, parishioners, and the like, are totally dissimilar to a corporation, and this dissimilarity arises from the peculiar character of a corporation, 4 Wash. C. C. R. 595, and this is clear by the decisions of this court. 4 Cranch. 306; 8 Wheat. 642.

I have been thus specific in the statement of the precedents in the court, that it may appear that this dissent involves no attempt to innovate upon the doctrines of the court, but the contrary, to maintain those sustained by time and authority in all their integrity.

The declaration before us describes the defendant "as a body corporate by act of the general assembly of Maryland," and corresponds therefore with the cases cited from 5 Cranch, 57; 6 Wheat. 450; 1 Pet. 238; and in those cases jurisdiction was first questioned and disclaimed in this court. These cases were not cited in Letson's case, and are decisive of this.

'If we search the record for facts to sustain the jurisdiction, we can collect that the defendant has been recognized as a body corporate by the legislature of Virginia, is commorant, and transacts business there by its authority, has for its corporators citizens and a city of that State, and that the plaintiff is also a citizen of Virginia. If these facts are considered with reference to the question of jurisdiction, all the cases decided by this court on this subject, have principles which would exclude it. Even Letson's case prescribes that the corporation should carry on its business in the State of its charter

and that case hardly contemplated an estoppel, such as is described in the opinion of the court.

I am compelled to consider this case as uncontrolled by the declaration of doctrine in Letson's case ; nor do I consider the cases in which the decision of the question has been waived as obligatory. I cannot look for the conclusions of this court or any of its members, except from the public, authorized, and responsible opinions delivered here in cases legitimately calling for them. For this conclusion, I have the sanction of the highest authority. Chief Justice Marshall, replying to the argument that corporations under no circumstances, and by no averment, could be a party to a suit in the courts of the United States, says : "Repeatedly has this court decided cases between a corporation and an individual, without feeling a doubt of its jurisdiction," and adds : "Those decisions are not cited as authority, for they were made without a consideration of the particular point."

The inquiry now presented is, shall I concur in a judgment which removes the ancient landmarks of the court, in reference to its jurisdiction, and which it established with care and solemnity, and maintained for so long a period with consistency and circumspection ? I am compelled to reply in the negative.

A corporation is not a citizen. It may be an artificial person, a moral person, a juridical person, a legal entity, a faculty, an intangible, invisible being ; but Chief Justice Marshall employed no metaphysical refinement, nor subtlety, nor sophism, but spoke the common sense, "the universal understanding," as he calls it, of the people, when he declared the unanimous judgment of this court, "that it certainly is not a citizen."

Nor were corporations within the contemplation of the framers of the constitution when they delegated a jurisdiction over controversies between the citizens of different States. The citation by the court from *The Federalist*, proves this. It is said by the writers of that work, "that it may be esteemed as the basis of union that the citizens of each State shall be entitled to all the immunities and privileges of citizens of the several States." And if it be a just principle that every government ought to possess the means of executing its own provisions, by its own authority, it will follow that, in order to the inviolable maintenance of that equality of immunities and privileges to which citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. Thus to administer the rights and privileges of citizens of the different States, held under a constitutional guarantee, when brought into collision or con-

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troverſy — rights and immunities derived from the conſtitutional compact, and forming one of its fundamental conditions, was the object of this jurisdiction. The commonplace, that it reſulted as a concession to the poſſible fears and apprehenſions of ſuitors, that juſtice might not be impartially adminiſtered in ſtate jurisdiction, ſoothing as it is to the official ſenſibilities of the federal courts, furniſhes no ſatisfactory explanation of it.

[* 352] * Hence the interpretation of that inſtrument which transferred to the artificial perſons created by ſtate legiſlation, the rights or privileges of the corporators, derived from the conſtitution of the United States, as citizens of the Union, and held independently and without any relation to their rights as corporators — was, to ſay no more, a broad and liberal interpretation. Nor did the court in Deveau's caſe affect the leaſt ſelf-denial or diffidence in making the bounds of its power. It declared that “the duties of the court, to exerciſe a jurisdiction where it is conferred, and not to uſurp it where it is not conferred, are of equal obligation,” and in this ſpirit, rejected a jurisdiction over a caſe exactly like the preſent.

The doctrine of the court in Earle's caſe, 13 Pet. 519, and Runyan's caſe, 14 Pet. 122, to the reſult that corporations have no extra-territorial rights, but that the legal exerciſe of their faculties, extra-territorially, was the effect of a rule of comity among the States, dependent upon their policy and convenience, and revocable at their pleaſure, was in harmony with theſe judgments of the court, and the conſtitutional principles I have ſtated. The adminiſtration of the rules of domeſtic policy adopted by the ſeveral States, in reference to theſe artificial creatures of a domeſtic legiſlation, belonged to ſtate jurisdictions, and were aſcertainable from its laws and judicial interpretations. But when, from the later caſe of Letſon, it was ſuppoſed that theſe legal entities had a *ſtatus* which admitted them to the federal tribunals by a conſtitutional recognition, the inquiry at once aroſe, for what purpoſe was this privilege held? The inter-dependence between the ſections of the conſtitution which defined the privileges and immunities of citizens of the Union, and the jurisdiction of the federal courts in controverſies between citizens of the States, was known and felt. It was argued that the capacity to ſue was only a conſequent of the right to contract, to hold property, and to perform civil acts. They commenced, therefore, an agitation of the ſtate courts for their rights as “citizens of the Union.” The ſupreme court of Kentucky, 12 B. Mon. 212, repelling theſe pretenſions and expoſing their perilous character, thus refers to Letſon's caſe, which had been relied on for their ſupport: “There are ſome expreſſions in that opinion which indicate that corporations may be regarded as citizens to

all intents and purposes. But in saying this, the court went far beyond the question before them, and to which it may be assumed that their attention was particularly directed. So, too, in New Jersey, 3 Zabris. 429, it was argued that the existence of the extra-territorial rights of corporations "is not now a question of comity in the United States, but a constitutional principle incapable of being altered by state legislation."

* And opinions from jurists of preëminence in Massachu- [* 353] setts and New York were laid before the court to sustain the argument founded upon the relaxing doctrines of this court.

Thus the introduction of new subjects of doubt, contest, and contradiction, is the fruit of abandoning the constitutional landmarks.

Nor can we tell when the mischief will end. It may be safely assumed that no offering could be made to the wealthy, powerful, and ambitious corporations of the populous and commercial States of the Union so valuable, and none which would so serve to enlarge the influence of those States, as the adoption, to its full import, of the conclusion, "that to all intents and purposes, for the objects of their incorporation, these artificial persons are capable of being treated as a citizen as much as a natural person."

The supreme court of Kentucky says, truly: "The apparent reciprocity of the power would prove to be a delusion. The competition for extra-territorial advantages would but aggrandize the stronger to the disparagement of the weaker States. Resistance and retaliation would lead to conflict and confusion, and the weaker States must either submit to have their policy controlled, their business monopolized, their domestic institutions reduced to insignificance, or the peace and harmony of the States broken up and destroyed." To this consummation, this judgment of the court is deemed to be a progress. The word "citizen," in American constitutions, state and federal, had a clear, distinct, and recognized meaning, understood by the common sense, and interpreted accordingly by this court through a series of adjudications.

The court has contradicted that interpretation, and applied to it rules of construction which will undermine every limitation in the constitution, if universally adopted. A single instance of the kind awakens apprehension, for it is regarded as a link in a chain of repetitions.

The litigation before this court, during this term, suffices to disclose the complication, difficulty, and danger of the controversies that must arise before these anomalous institutions shall have attained their legitimate place in the body politic. Their revenues and establishments mock at the frugal and stinted conditions of state admin-

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istration; their pretensions and demands are sovereign, admitting impatiently interference by state legislative authority. And from the present case, we learn that, disdainful of "the careless arbiters" of state interests, they are ready "to hover about them" in "efficient and vigilant activity," to make of them a prey; and, to accomplish this, to employ corrupting and polluting appliances.

[* 354] * I am not willing to strengthen or to enlarge the connections between the courts of the United States and these litigants. I can consent to overturn none of the precedents or principles of this court to bring them within their control or influence. I consider that the maintenance of the constitution, unimpaired and unaltered, a greater good than could possibly be effected by the extension of the jurisdiction of this court, to embrace any class either of cases or of persons.

Mr. Justice Catron authorizes me to say that he concurs in the conclusions of this opinion.

Our opinion is, that the judgment of the circuit court should be affirmed for the want of jurisdiction.

18 H. 331, 404; 21 H. 112, 202; 1 B. 286; 2 Wal. 45; 5 Wal. 541.

FITZ HENRY HOMER, Plaintiff in Error, v. GEORGE L. BROWN.

16 H. 354.

The parties to a real action in the supreme judicial court of Massachusetts, agreed on a statement of facts, and that the court might order a nonsuit or default and enter judgment thereon; *Held*, 1. That a nonsuit was not a bar; 2. That the agreement was not an estoppel to sue again. 3. That, upon the construction of a will on which the title depended, the demandant was entitled to recover.

The revised statutes of Massachusetts, which abolished writs of right, did not prevent such writs from being brought in the circuit court of the United States, if the seisin of the demandant was within the limitation of time allowed by the laws of that State for the recovery of land.

THE case is stated in the opinion of the court. The will in question was as follows:—

[* 355] * Item: For my youngest child and son, Samuel Livermore Brown, who was born of my last wife, Elizabeth Livermore, I make the following arrangement of property in my estate for him: The property of my first wife has been in some measure mingled in common stock; the property which might otherwise have descended to me by my last wife, Elizabeth, was, after her decease, conveyed by her father, by deed, and by a brother by will, to her only surviving child, (the said Samuel,) which was perfectly consistent with my approbation; and the property, being in land, is sufficient for several farms; and if the said Samuel should quit seafaring pursuits, which he has

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selected for his employment, and turn his attention to agricultural pursuits, he will not need any addition to his acres, but it may be necessary and convenient to have some annual income to aid him in his labor; therefore, I give and bequeathe to my son, Samuel L. Brown, the rent or improvement of my store and wharf *privilege, situate on the northerly side of the town dock, [* 356] in Boston; he to receive the rent annually or quarterly (if the same should be leased or let) during his natural life, and the premises to descend to his heirs; this being the estate I purchased of Mr. Stoddard—reference to the records will give the bounds. Also, I do hereby direct my son, William, to vest one thousand dollars in bank stock, or the stocks of this State or the United States, the interest of which, as it arises, to be paid by him to the said Samuel during his life, and the stock to descend to the heirs of the said Samuel. This is to be advanced by the said William as some consideration for the difference in the value of the two stores.

(The will then went on to create a fund, which was to be divided into four equal parts, one of which was for Samuel, and then proceeded thus:—

But I do hereby direct my executor, hereafter named, to vest one half of the said Samuel's fourth part of this property in the stock of some approved bank in Boston, or in the stocks of this State or the United States, or in real estate; the dividend or rent to [be] paid by him to the said Samuel as it may arise, and the principal or premises to descend to his heirs; and the other half of this fourth part to be paid to the said Samuel in money, when collected, to stock his farm, or for other purposes.

This will was executed on the 26th of April, 1815.

On the 30th of May, 1816, the testator added the following codicil:—

Whereas my son Samuel has sold his two farms which were left to him, one by his late grandfather Livermore, by deed, and the other by his uncle George Livermore, by will; and whereas it appears he has relinquished every intention to agricultural pursuits, and is now absent at sea, with a view to qualify himself for a seafaring life, and, under these circumstances, considering it to be more for his interest and happiness, I do hereby repeal and revoke the part of my will wherein any part of my estate, real or personal, is devised or bequeathed to my son, Samuel, therein named, and in lieu thereof do bequeathe to my son, the said Samuel, only the income, interest, or rent of said real or personal estate, as the case may be, so that no more than the income, interest, or rent of any portion of my real or personal estate, and not the principal of said personal or fee of said real

estate may come to the said Samuel, my son, which, at his decease, it is my will that the said real and personal estate shall then go to the legal heirs.

Chandler and Bartlett, for the plaintiff.

Lawrence and Dow, contra.

(Mr. Justice Curtis, having been of counsel, did not sit in the argument of this case.)

[* 363] * WAYNE, J., delivered the opinion of the court.

This cause has been brought to this court from the circuit court of the United States for the district of Massachusetts, by a writ of error.

The action is a writ of right. The demandant declares that he has been deforced by the tenant, Fitz Henry Homer, of certain premises claimed by him as his right and inheritance, of which he was seised in fee within twenty years before the commencement of his suit, at the May term of the circuit court, A. D. 1851. A motion was made at a subsequent term to quash the writ, upon the ground that the remedy by a writ of right had been abolished by the revised statutes of Massachusetts, c. 101, § 51. The court denied the motion. Then the defendant, Fitz Henry Homer, who is a tenant of a part of the land demanded, tendered the general issue on a joinder of the mise, on the mere right of the demandant, as to that of part of the land of which the defendant is tenant; with pleas of general non-tenure as to a part of the demanded premises, and of special non-tenure as to the residue. His tender was allowed, and such pleas were filed; upon which the counsel of the demandant joined issue. Subsequently, the defendant asked leave to amend his pleas, by striking out the pleas of the general issue and general non-tenure, as the same had been pleaded, which was permitted, and he filed a plea of joinder of the mise on the mere right, with pleas of non-tenure. The demandant joined issue on the first plea, and filed a replication averring that, from any thing alleged, he was not precluded from having his action against the defendant, because, at the time of suing out his writ, the tenant was tenant of the freehold, as has been supposed in the writ, of all the residue of the demanded premises; and he prayed that the same might be inquired of by the country. Issue having been taken upon the replication, the cause was tried. At the trial, the demandant put in evidence the will of William Brown, dated the 26th April, 1815, with a codicil dated 30th

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May, 1816, upon which he rested his title. The tenant produced the record of a judgment in a writ of entry, brought by the defendant in error against the plaintiff in error, in the supreme judicial court of Massachusetts, embracing the premises here demanded, and which had been submitted to that court on an agreement of facts, in which a judgment of nonsuit was directed by the court; and this agreement of facts and judgment the tenant offered in evidence as a bar or estoppel to the demandant, so far as the premises were identical with those claimed in this writ of right, and moved the court so to instruct the jury. The tenant then put in the deeds of William Brown, Zebiah C. Tilden, Sally Brown, and Samuel Livermore Brown, * dated May 5, 1824, who were the only children and sole [*364] heirs at law of William Brown, the testator, maintaining that the grantors were enabled by virtue of the will and codicil, to pass all the title to the demanded premises which the testator had at the time of his death.

The tenant further moved the court to instruct the jury that the action could not be maintained, because writs of right to recover land in the State of Massachusetts had been abolished by its laws.

Also, to instruct the jury that the demandant took nothing under the will and codicil of William Brown, and that on the pleadings and facts in the case, the demandant could not maintain this action. Another instruction was asked, namely, that the rights and title of the demandant, and those under whom he claims to the demanded premises, or any part thereof, have been barred by the statute of limitations of Massachusetts. But the counsel for the tenant, now the plaintiff in error in this court, stated in his argument that his other prayers for instruction were not relied upon. The court refused to give either of the instructions just recited, and instructed the jury that the demandant was entitled to a verdict for that part of the demanded premises as to which the tenant had pleaded the general issue; and as to that part of the demanded premises to which the tenant had put in pleas of non-tenure, that their verdict should be for the tenant. The counsel for the defendant excepted to the refusals and to the instructions which the court gave, and the jury returned a verdict for the demandant, "that on the first issue, being the general issue, the jury find that the said George L. Brown hath more mere right to have an undivided moiety of so much of the demanded premises as is thus described, (northerly by Clinton street, sixteen feet; easterly by the centre of a brick wall, dividing the premises from land formerly of D. Packer, deceased, fifteen feet eight inches; southwardly by land, formerly of Savage, now of Homer, the defendant, twenty-

three feet, with the appurtenances to him and his heirs, as he hath above demanded the same,) than the said Homer has to hold the same as he now holds it, as the said Brown, by his aforesaid writ, hath above supposed; and that the demandant was seised of the same, as by him in his writ alleged. On the second and third issues, being upon the pleas of general and special non-tenure, the jury find that the said Fitz Henry Homer was not at the date of the writ, has not been since, and is not now, seised as of freehold of any part of the land therein described, as the said Brown, by his aforesaid writ, hath above supposed."

We think that the remedy by a writ of right for the re-
[* 365] covery * of corporeal hereditaments in fee simple, may still be resorted to in the circuit court of the United States for the district of Massachusetts, though the same has been abolished in the courts of that State, and that the court did not err in instructing the jury accordingly. Such a remedy existed in the courts of Massachusetts until the year 1840, and it became, by the judiciary acts of 1789¹ and 1792,² a remedy in the circuit court for that district; any subsequent legislation of the State abolishing it in its courts does not extend to the courts of the United States, because it is a matter of process which is exclusively regulated by the acts of congress. *Wayman v. Southard*, 10 Wheat. 1. It is as process alone, however, that it continues in the courts of the United States, subject to the limitation prescribed by the revised statutes of Massachusetts, as to the time within which such a remedy may be prosecuted in its courts.

The second instruction asked was also properly refused. A judgment of nonsuit is only given after the appearance of the defendant, when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he has not followed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *nonpros'd*, and is liable to pay the costs. But as nothing positive can be implied from the plaintiff's error as to the subject-matter of his suit, he may reassert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not. *Blackstone*, 295; 1 *Pick.* 371; 2 *Mass.* 113.

It is not, however, only for a non-appearance, or for delays or defaults, that a nonsuit may be entered. The plaintiff in such particulars may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may concur to take it from the jury with the view to submit the law of the case to the

¹ 1 *Stats. at Large*, 73.

² 1 *Ib.* 275.

court upon an agreed statement of facts with an agreement that the plaintiff shall be *nonpros'd*, if the facts stated are insufficient to maintain the right which he claims. The court in such a case will order a nonsuit, if it shall think the law of it against the plaintiff, but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same and no more than if he had been *nonpros'd* for a non-appearance when called to prosecute his suit, or for one of those delays from which it may be adjudged that he is indifferent. The supreme court of Massachusetts, in deciding the cause submitted to it, did so in conformity to an agreement between the parties, but its judgment cannot be pleaded as a bar to the suit, though in giving it an opinion was expressed upon the merit of the demandant's claim

* under the will of his grandfather, William Brown. [* 366]

The court was also asked to instruct the jury that the demandant was estopped from prosecuting this action by his agreement in his previous suit to submit it upon a statement of facts. In every view which can be taken of an estoppel, that agreement cannot be such here, because the demandant does not make in this case any denial of a fact admitted by him in that case. He rests his title here to the demanded premises upon the same proofs which were then agreed by him to be facts. This he has a right to do. His agreement only estopped him from denying that he had submitted himself to be nonsuited, or that he was not liable to its consequences.

We come now to the third prayer for an instruction which the court denied. It was that the demandant takes nothing under the will of William Brown, and that he has no title to the demanded premises or any part thereof. The land sued for is a part of what the testator designates in his will, the estate bought from Mr. Stoddard. He bequeathes the rent or improvement of the store upon it, with the wharf privilege, to his son, Samuel L. Brown, during his natural life, "and the premises to descend to his heirs." It is here said that this bequest and devise was revoked by the testator in the codicil to his will. Care must be taken in the application of the codicil to the will, but in our opinion the testator's intention may be satisfactorily shown from the language which he uses in the codicil, and from its direct connection with one of the bequests in the will to Samuel. The latter will be more readily seen by a recital of all the testator's bequests to Samuel, before we make the application of the codicil to that to which we have referred. The first bequest is that already stated, of the rent or improvement of the store and wharf privilege of the Stoddard property. He then directs his son William, as some consideration for the difference in the value of the devise to

him over that of his bequest to Samuel, to vest \$1,000 in stock, the interest of which is to be paid to Samuel during his life and the principal to descend to his heirs. The third bequest to Samuel is one fourth part of a mass of real and personal estate as it is mentioned in the will, and all of his other property not before or hereafter disposed of, as the same may be turned into money, with this direction to his executor, to vest one half of one fourth of it in stock or real estate, "the dividend or rent of which is to be paid to Samuel as it may arise, and the principal or premises to descend to his heirs."

The testator then bequeathes to Samuel the other half of that fourth in money when collected to stock his farm or for other purposes. [* 367] The difference between this last and the other bequests to Samuel being that he had in all of the others only a life interest, and in this an unqualified and absolute right. Now, the question is, what qualifications have been made by the testator's codicil of his bequests in the will to Samuel and his heirs, and whether the codicil does not relate exclusively to that bequest of money left to Samuel to stock his farm and for other purposes? That must be determined by the language of the codicil. If that is sufficient to indicate the testator's meaning, we are not permitted to search out of it for an inference of his intention. If it bears directly upon one of his bequests to Samuel in such a way as to change it from an absolute gift into a life interest, in conformity with the prevalent intention of the testator manifested throughout the body of his will, to leave to Samuel only a life interest in any part of his estate, except as to that bequest of the one half of one fourth already mentioned to stock his farm and for other purposes, no other application of the codicil can be made to any other bequest in the testator's will.

We learn from the codicil, that Samuel had sold his farm between the date of the will and that of the codicil, for the stocking of which the testator had given to him a sum of money. And then the testator states his inducement for making the codicil to be Samuel's apparent relinquishment "of every intention to agricultural pursuits," and that, being absent at sea to qualify himself for a seafaring life, he considers it to be more for his interest and happiness to repeal and revoke "the part of my will wherein any part of my estate, real or personal, is devised or bequeathed to my son Samuel therein named," and in lieu thereof to bequeathe to him only the income, interest, or rent of the real or personal estate during his life. Now, excepting the unqualified bequest of the money to stock his farm, the testator had not, in either of his other bequests, left to Samuel any more than the income, interest, or rent of any part of his real or

personal estate ; declaring that the property or stock from which such rent or income might arise, should go to his heirs. With such corresponding intentions, both in the will and in the codicil, in regard to Samuel, the codicil cannot be considered as a revocation of the former interest given to Samuel for his life, and afterwards to his heirs, unless the testator has used language showing an express intention to exclude Samuel's heirs from that which had been given to him for his life, and afterwards without any limitation to them. That the testator has not done. The only words in the codicil which have been urged in the argument to show that the testator meant to do so, is his uncertain declaration, at the end of it, that it was his will that the real and personal estate out of which Samuel was
* to have the income during his life, should at his death go [* 368] to the legal heirs. It was said that these words, the legal heirs, in connection with those immediately preceding, "so that no more than the income, interest, or rent of any portion of his real or personal, and not the fee of said real, may come to the said Samuel," meant nothing, unless they related to the devise of the Stoddard estate, and to the testator's own heirs, because in that devise it had been provided already that the fee should go to the heirs of Samuel.

Without yielding to such a conclusion, it is sufficient for us to say, that the testator had provided that other real estate might be bought out of one half of one fourth of the proceeds of the property left to the executor, in trust to be sold for the benefit of his four children, the rent of which was given to Samuel with a devise of it after his death to his heirs, and that he had given to Samuel absolutely the other half of that fourth, which last he meant by his codicil to revoke and to place upon the same footing with the rest of his estate, the interest or rent of which he bequeathed to Samuel for his life. We have been brought to this conclusion by the language of the testator in his will and codicil. His recital of the causes which induced him to make the codicil, shows that he had a particular part of his will in view, (and not all those parts of it in which he had provided for Samuel,) singly in connection with Samuel, and that it was a consequence of those circumstances, (the sale by Samuel of his farm, and his intention to follow a seafaring life,) which made him consider it to be more for his interest and happiness to revoke that bequest only in which he had given absolutely a sum of money to his son to stock his farm. The words of revocation are : "I do hereby repeal and revoke the part of my will wherein any part of my estate, real or personal, is bequeathed to my son, the said Samuel, and in lieu thereof do bequeathe to my son, the said Samuel, only the income, interest, or rent of said real or personal estate, as the case may be."

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It is only by changing the words "the part of my will" into the "parts" of my will, that the codicil can be made to bear upon all of those parts of the will in which Samuel had been made for his life the object of that arrangement for him of which his father speaks in that clause of the will which contains the Stoddard bequest. We think, from the language used by the testator, that he has bequeathed and devised to the heirs of Samuel, all of the property in which their father was given a life interest; that the codicil revokes only that clause of the will which contains a bequest of money absolutely to Samuel, and puts it upon the same footing with his other bequests to Samuel, both as respects Samuel and his heirs. The in-

[* 369] struction asked by the tenant * was, therefore, in our opinion, rightly refused by the court, and we shall direct its judgment in the suit to be affirmed.

19 H. 393.

THE PIQUA BRANCH OF THE STATE BANK OF OHIO, Plaintiff in Error,
v. JACOB KNOOP, Treasurer of Miami County.

16 H. 369.

The legislature of a State, if not restrained by its constitution, may make a valid and binding contract with a banking corporation, in its charter, that no more than a specified amount of taxes shall be levied on its property during a term of years; and a succeeding legislature has not power to pass a law impairing the obligation of such contract.

When a case is brought here under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85,) upon the ground that a law of a State impairs the obligation of a contract, this court must determine whether a contract exists, and what are its constructions and obligations.

In construing the constitution of a State, this court will adopt a settled construction, existing when the contract in question was made, acquiesced in by all the branches of the government, and under the authority of which the contract was entered into, and reject a more recent decision by the highest court of the State, as not affording the rule for such a case.

Upon the construction of a banking law of Ohio, involved in this case, *held*, that it was not merely declaratory of the intentions of the legislature, but amounted to a contract.

THE case is stated in the opinion of the court.

Stanberry and Vinton, for the plaintiff.

Spalding and Pugh, contra.

[* 376] * M'LEAN, J., delivered the opinion of the court.

This is a writ of error to the supreme court of the State of Ohio.

The proceeding was instituted to reverse a decree of that court, entered in behalf of Jacob Knoop, treasurer, against the Piqua Branch of the State Bank of Ohio, for a tax of \$1,266.63, assessed against the said branch bank for the year 1851.

By the act of 1845, under which this bank was incorporated, any number of individuals, not less than five, were authorized to form banking associations to carry on the business of banking in the State of Ohio, at a place designated; the aggregate amount of capital stock in all the companies not to exceed \$6,150,000.

In the 51st section, it is provided that every banking company authorized under the act to carry on the business of banking, whether as a branch of the State Bank of Ohio, or as an independent banking association, "shall be held and adjudged to be a body corporate, with succession, until the 1st of May, 1866; *and [*377] thereafter until its affairs shall be closed." It was made subject to the restrictions of the act.

The 59th section requires "the directors of each banking company, semiannually, on the first Mondays of May and November, to declare a dividend of so much of the net profits of the company as they shall judge expedient; and on each dividend day the cashier shall make out and verify by oath, a full, clear, and accurate statement of the condition of the company as it shall be on that day, after declaring the dividend, and similar statements shall also be made on the first Mondays of February and August in each year." This statement is required to be transmitted to the auditor of state.

The 60th section provides that each banking company under the act, or accepting thereof, and complying with its provisions, shall, semiannually, on the days designated for declaring dividends, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. The sum so set off to be paid to the treasurer on the order of the auditor of state.

The Piqua Branch Bank was organized in the year 1847, under the above act; and still continues to carry on the business of banking, and continued to set off and pay the semiannual amount as required; and on the first Mondays of May and November, in 1851, there was set off to the State six per cent. of the profits, deducting expenses and ascertained losses for the six months next preceding each of those days, and the cashier did, within ten days thereafter, inform the auditor of state of the amount so set off on the 15th of November, 1851, the same amounting to \$862.50; which sum was paid to the treasurer of state, on the order of the auditor; which payment the bank claims was in lieu of all taxes to which the company or its stockholders were subject for the year 1851.

On the 21st of March, 1851, an act was passed, entitled "An act to

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tax banks and bank and other stocks, the same as property is now taxable by the laws of the State."

This act provides that the capital stock of every banking company incorporated by the laws of the State, and having the right to issue bills or notes for circulation, shall be listed at its true value in money, with the amount of the surplus and contingent fund belonging to such bank; and that the amount of such capital stock, surplus and contingent fund, should be taxed for the same purposes and to the

same extent that personal property was or might be required [*378] to be taxed in the place *where such bank is located; and

that such tax should be collected and paid over in the same manner that taxes on other personal property are required by law to be collected and paid over.

In pursuance of this act, there was assessed for the year 1851, on the capital stock, contingent and surplus fund of the Piqua Bank, a tax amounting to the sum of \$1,266.63. The bank refused to pay this tax, on the ground that it was in violation of its charter. Suit was brought by the State against the bank for this tax. The defence set up by the bank was, that the tax imposed was in violation of its charter, which fixed the rate of taxation at six per cent. on its dividends, deducting expenses and losses; but the supreme court of the State sustained the act of 1851, against the provision of the charter by which, it is insisted, the contract in the charter was impaired.

We will first consider whether the specific mode of taxation, provided in the 60th section of the charter, is a contract.

The operative words are, that the bank shall, "semiannually, on the days designated in the 59th section for declaring dividends, set off to the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject."

This sentence is so explicit, that it would seem to be susceptible of but one construction. There is not one word of doubtful meaning when taken singly, or as it stands connected with the sentence in which it is used. Nothing is left to inference. The time, the amount to be set off, the means of ascertaining it, to whom it is to be paid, and the object of the payment, are so clearly stated, that no one who reads the provision can fail to understand it. The payment was to be in lieu of all taxes to which the company or stockholders would otherwise be subject. This is the full measure of taxation on the bank. It is in the place of any other tax which, had it not been for this stipulation, might have been imposed on the company or stockholders.

This construction, I can say, was given to the act by the executive authorities of Ohio, by those who were interested in the bank, and generally by the public, from the time the bank was organized down to the tax law of 1851.

In the case of *Debolt v. The Ohio Insurance and Trust Company*, 1 Ohio, 563, new series, the supreme court, in considering the 60th section now before us, say: "It must be admitted the section contains no language importing a surrender *of the [*379] right to alter the taxation prescribed, unless it is to be inferred from the words, 'shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject;'" and it is frankly conceded that if these words had occurred in a general law they would not be open to such a construction. If the place where they are found is important, we have already seen this law is general in many of its provisions, and upon a general subject. Why may not this be classed with these provisions, especially in view of the fact, that in its nature it properly belongs there? We think it should be regarded as a law prescribing a rule of taxation, until changed, and not a contract stipulating against any change,—a legislative command, and not a legislative compact with these institutions." And the court further say: "The taxes required by this act are to be in lieu of other taxes,—that is, to take the place of other taxes. What other taxes? The answer is, such as the banks or the stockholders 'would otherwise be subject to pay. The taxes to which they would be otherwise subject were prescribed by existing laws, and this, in effect, operated as a repeal of them, so far as these institutions were concerned.'"

With great respect, it may be suggested there was no general tax law existing, as supposed by the court, under which the banks chartered by the act of 1845 could have been taxed, and on which the above provision could, "in effect, operate to repeal."

The general tax law of the 12th of March, 1831, which raised the tax to five per cent. on dividends, and which operated on all the banks of Ohio, except the "Commercial Bank of Cincinnati," was repealed by the small note act of 1836, and that could operate only on banks doing business at the time of its passage.

The act of the 13th of March, 1838, repealed the act of 1836 so far "as it restricts or prohibits the issuing and circulation of small bills." The act of 1836 authorized the treasurer of State to draw upon the banks for the amount of twenty per cent. upon their dividends as their proportion of the state tax; and provided that if any bank should relinquish its charter privilege of issuing bills of less denomination than three and five dollars, the tax should be reduced to five per cent.

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upon its dividends. As the prohibition of circulating small notes was repealed, the tax necessarily fell. Neither the twenty nor the five per cent. could be exacted. The five per cent. was a compromise for the twenty; as the twenty was repealed by the repeal of the prohibition of small notes, neither the one nor the other could be collected.

But if this were not so, the bank act of 1842, which im-
[* 380] posed * a tax of one half per cent. on the capital stock of the bank, repealed, by its repugnancy, any part of the act of 1836 which, by construction or otherwise, could be considered in force. And the act of 1842 was repealed by the act of 1845. There is a general act in Ohio, declaring that the repeal of an act shall not revive any act which had been previously repealed. Swan's Stat. 59.

If this statement be correct, as it is believed to be, the legislature could not have intended, by the special provision in the sixtieth section, to exempt the bank from tax by the existing law, as no such law existed, but to exempt from the operation of tax laws subsequently passed. This is the clear and fair import of the compact, which we think would not be rendered doubtful if a tax law had existed at the time the act of 1845 was passed.

The 60th section is not found in a general law, as is intimated by the supreme court of the State. The act of 1845 is general only in the sense, that all banking associations were permitted to organize under it; but the act is as special to each bank as if no other institution were incorporated by it. We suppose this cannot be controverted by any one. This view is so clear in itself that no illustration can make it clearer.

Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. Such is a public corporation, used for public purposes. But a bank, where the stock is owned by individuals, is a private corporation. This was not denied or questioned by the counsel in argument, although it has been controverted in this case elsewhere. But this court and the courts of the different States, not excepting the supreme court of Ohio, have so universally held that banks, where the stock is owned by individuals, are private corporations, that no

legal fact is susceptible of less doubt. Mr. Justice Story, in his learned and able remarks in the Dartmouth College case, 4 W. 669, says: "A bank created by the government for its own uses, where the stock is exclusively owned by the government is, in the strictest sense, a public corporation."

"But a bank whose stock is owned by private persons, is a *private corporation, although it is erected by the govern- [*381] ment, and its objects and operations partake of a public nature. The same doctrine," he says, "may be affirmed of insurance, canal, bridge, and turnpike companies." There can be no doubt that these definitions are sound, and are sustained by the settled principles of law.

It by no means follows that because the action of a corporation may be beneficial to the public, therefore it is a public corporation. This may be said of all corporations whose objects are the administration of charities. But these are not public, though incorporated by the legislature, unless their funds belong to the government. Where the property of a corporation is private, it gives the same character to the institution, and to this there is no exception. Men who are engaged in banking understand the distinction above stated, and also that privileges granted in private corporations are not a legislative command, but a legislative contract, not liable to be changed.

This fact is shown by the following circumstances: "An act to regulate banking in Ohio," passed the 7th of March, 1842. The 1st section provided: "That all companies or associations of persons desiring to engage in and carry on the business of banking within this State, which may hereafter be incorporated, shall be subject to the rules, regulations, limitations, conditions, and provisions contained in this act, and such other acts to regulate banking as are now in force, or may hereafter be enacted, in this State."

The 20th section of that act provided that a tax of one half per cent. per annum on its capital should be paid, and such other tax upon its capital or circulation as the general assembly may hereafter impose. An amendment to this act was passed the 21st February, 1843; but the act and the amendment remained a dead letter upon the statute book. No stock was subscribed under them, and they were both repealed by the act of 1845, under which nearly three fourths of the banks in Ohio were organized. This act contained the express stipulation that "six per cent. on the dividends, after deducting expenses and losses, should be paid in lieu of all taxes."

This compact was accepted, and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1851, I believe, the banks, the profession, and the bench considered this as a con-

tract, and binding upon the State and the banks. For more than thirty-five years this mode of taxing the dividends of banks had been sanctioned in the State of Ohio. With few exceptions the banks were so taxed, where any tax on them was imposed. In the case of *the State of Ohio v. The Commercial Bank of Cincinnati*, [*382] 10 Ohio, 535, the supreme court of Ohio say, we take it to be well settled, that the charter of a private corporation is in the nature of a contract between the State and the corporation. Had there ever been any doubts upon this subject, those doubts must have been removed by the decision of the supreme court of the United States, in the case of *Woodward v. Dartmouth College*. And the court remark, "the general assembly say to such persons as may take the stock, you may enjoy the privileges of banking, if you will consent to pay to the State of Ohio, for this privilege, four per cent. on your dividends, as they shall from time to time be made. The charter is accepted, the stock is subscribed, and the corporation pays, or is willing to pay, the consideration stipulated, to wit, the four per cent." And the court say, "here is a contract, specific in its terms, and easy to be understood." "A contract between the State and individuals is as obligatory as any other contract. Until a State is lost to all sense of justice and propriety, she will scrupulously abide by her contracts, more scrupulously that she will exact their fulfilment by the opposite contracting party."

This opinion commends itself to the judgment, both on account of its sound constitutional views and its elevated morality. It was pronounced at December term, 1835. That decision was calculated to give confidence to those who were desirous to make investments in banking operations, or otherwise, in the State of Ohio.

Ten years after this opinion, and after an ineffectual attempt had been made by the act of 1842, and its amendment in 1843, to organize banks in Ohio, without a compact as to taxation, the act of 1845 was passed, containing a compact much more specific than that which had been sustained by the supreme court of the State. Under such circumstances, can the intentions of the legislature of Ohio, in passing the act of 1845, be doubted, or the inducements of the stockholders to vest their money under it? Could either have supposed that the 60th section proposed a temporary taxation? Such a supposition does great injustice to the legislature of 1845. It is against the clear language of the section, which must ever shield them from the imputation of having acted inconsiderately or in bad faith. They passed the charter of 1845, which they knew would be accepted, as it removed the objections to the act of 1842.

Can the compact in the 60th section be "regarded as a law pre-

scribing a rule of taxation until changed, and not a contract stipulating against any change ; a legislative command, and not a legislative compact with these institutions ? ” We cannot but treat with great respect the language of the highest judicial tribunal of a State, and we would say, that in our opinion it does * not [* 383] import to be a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted. According to our views, no other construction can be given to the contract, than that the tax of six per cent. on the dividends is in lieu of all subsequent taxes which might otherwise be imposed ; in other words, taxes to which the company or the stockholders would have been liable, had the specific tax on the dividends on the terms stated not been enacted.

In the opinion of the supreme court of the State, it is said, the 60th section, in effect, repealed the existing law under which the bank would have been taxed, and that this is the obvious application of the language used ; and they add : “ That the general assembly intended only this, and did not intend it to operate upon the sovereign power of the State, or to tie up the hands of their successors, we feel fully assured. To suppose the contrary would be to impeach them of gross violation of public duty, if not usurpation of authority.”

So far as regards the effect of the 60th section to repeal existing laws, if no such laws existed, it would follow that no such effect was produced, and we may presume that this was in the knowledge of the legislature of 1845 ; and in saying that the compact was intended to run with the charter, we only impute to the legislature a full knowledge of their own powers, and the highest regard to the public interest. The idea that a State, by exempting from taxation certain property, parts with a portion of its sovereignty, is of modern growth ; and so is the argument that if a State may part with this in one instance it may in every other, so as to divest itself of the sovereign power of taxation. Such an argument would be as strong and as conclusive against the exercise of the taxing power. For if the legislature may levy a tax upon property, they may absorb the entire property of the tax-payer. The same may be said of every power where there is an exercise of judgment.

The legislature of Ohio passes a statute of limitations to all civil and criminal actions. Is there no danger that in the exercise of this power it may not be abused ? Suppose a year, a month, a week, or a day should be fixed as the time within which all actions shall be brought on existing demands, and if not so brought, the remedy should be barred. This is a supposition more probable under cir-

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cumstances of great embarrassment, when the voice of the debtor is always potent, than that the legislature will inconsiderately exempt property from taxation.

Under a statute of limitation, as supposed, the remedy [* 384] of the * creditor would be cut off, unless the courts should decide that a limitation to bar the right must be reasonable, but this power could not be exercised under any constitutional provision. It could rest only on the great and immutable principles of justice, unless the time was so short as manifestly to have been intended to impair or destroy the contract. To carry on a government, a more practical view of public duties must be taken.

When the State of Ohio was admitted into the Union by the act of the 30th of April, 1802,¹ it was admitted under a compact that "the lands within the State sold by congress shall remain exempt from any tax laid by or under the authority of the State, whether for State, county, township, or any other purpose whatever, for the term of five years from and after the day of sale." And yet by the same law the State "was admitted into the Union upon the same footing with the original States in all respects whatever."

Now, if this new doctrine of sovereignty be correct, Ohio was not admitted into the Union on the footing of the other sovereign States. Whatever may be considered of such a compact now, it was not held to be objectionable at the time it was made.

The assumption that a State, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the State. Now the exemption of property from taxation is a question of policy and not of power. A sound currency should be a desirable object to every government; and this in our country is secured generally through the instrumentality of a well-regulated system of banking. To establish such institutions as shall meet the public wants and secure the public confidence, inducements must be held out to capitalists to invest their funds. They must know the rate of interest to be charged by the bank, the time the charter shall run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation.

These privileges are proffered by the State, accepted by the stockholders, and in consideration funds are invested in the bank. Here is a contract by the State and the bank, a contract founded upon considerations of policy required by the general interests of the community, a contract protected by the laws of England and America,

¹ 2 Stats. at Large, 173.

and by all civilized States where the common or the civil law is established. In *Fletcher v. Peck*, 6 Cranch, 135, Chief Justice Marshall says: "The principle asserted is, that one legislature is competent to repeal any act * which a former legis- [* 385] lature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature."

"The correctness of this principle," he says, "so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. When, then, a law is in its nature a contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

And in another part of the opinion, he says: "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded on this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each State."

"No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts. A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."

In this form he says: "The power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligations of those contracts into which the State may enter."

The history of England affords melancholy instances where bills of attainder were prosecuted in parliament to the destruction of the lives and fortunes of some of its most eminent subjects. A knowledge of this caused a prohibition in the constitution against such a procedure by the States.

In the case of *The State of New Jersey v. Wilson*, 7 Cranch, 164, it was held: "That a legislative act, declaring that certain lands, which should be purchased for the Indians, should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a

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subsequent legislative act. Such repealing act being void under that clause of the constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts."

In 1758, the government of New Jersey purchased the [* 386] Indians' title to lands in that State, in consideration of which the government bought a tract of land on which the Indians might reside, an act having previously been passed that "the lands to be purchased for them shall not hereafter be subject to any tax, any law, usage, or custom to the contrary thereof in any wise notwithstanding." The Indians continued in possession of the lands purchased until 1801, when they applied for and obtained an act of the legislature, authorizing a sale of their lands. This act contained no provision in regard to taxation; under it the Indian lands were sold.

In October, 1804, the legislature repealed the act of August, 1758, which exempted these lands from taxes; the lands were then assessed, and the taxes demanded. The court held the repealing law was unconstitutional, as impairing the obligation of the contract, although the land was in the hands of the grantee of the Indians. This case shows that although a state government may make a contract to exempt property from taxation, yet the sovereignty cannot annul that contract.

In the case of *Gordon v. The Appeal Tax*, 3 How. 133, Mr. Justice Wayne, giving the opinion of the court, held: "That the charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it, which the legislature accepted. But that the corporate property of the bank, being separable from the franchise, may be taxed, unless there is a special agreement to the contrary."

And the court say, the language of the 11th section of the act of 1821 is: "And be it enacted, that upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." This, the court say, is the language of grave deliberation, pledging the faith of the State for some purpose, some effectual purpose. Was that purpose the protection of the banks from what that legislature and succeeding legislatures could not do, if the banks accepted the act, or from what they might do in the exercise of the taxing power? The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price of the prolongation of their franchise of banking. The power of the State to lay any further tax upon the franchise was exhausted. That is the contract between the State and the banks. It follows, then, as a matter of course,

when the legislature go out of the contract, proposing to pledge its faith, if the banks shall accept the act not to impose any further tax or burden upon them, that it must have meant by these words an exemption *from some other tax than a further [* 387] tax upon the franchise of the banks. The latter was already provided against; and the court held that the exemption extended to the respective capital stocks of the banks as an aggregate, and to the stockholders, as persons on account of their stocks. The judgment of the court of appeals of Maryland, which sustained the act imposing an additional tax on the banks, was reversed.

It will be observed that the above compact was applied to the stocks of the bank and the interest of the stockholders by construction.

The supreme court of Ohio say in relation to this case, that "the power to tax and the right to limit the power were both admitted by counsel, and taken for granted in the consideration of the case; and that a very large consideration had been paid for the extension of the franchise and the exemption of the stock from taxation."

In relation to the admissions of the counsel, it may be said that they were men not likely to admit any thing to the prejudice of their clients, which could be successfully opposed; nor would the court, on a constitutional question, rest their judgment on the admissions of counsel. Whether the consideration paid by the banks was large or small, we suppose was not a matter for the court, as the motives or consideration which induced a sovereign State to make a contract, cannot be inquired into as affecting the validity of the act.

In the argument, the case of *The Providence Bank v. Billing* was referred to, 4 Pet. 561. This reference impresses me with the shortness and uncertainty of human life. Of all the judges on this bench, when that decision was given, I am the only survivor. From several circumstances, the principles of that case were strongly impressed upon my memory; and I was surprised when it was cited in support of the doctrines maintained in the case before us. The principle held in that case was, that where there was no exemption from taxation in the charter, the bank might be taxed. This was the unanimous opinion of the judges, but no one of them doubted that the legislature had the power, in the charter or otherwise, from motives of public policy, to exempt the bank from taxation, or by compact to impose a specific tax on it. And this is clear from the language of the court.

The chief justice in that case says: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are ac

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known and asserted by all. It would seem that the relinquishment of such a power is never to be presumed. No one [* 388] can controvert the correctness of these axioms." * The relinquishment of such a power is never to be presumed; but this implies it may be relinquished, or taxable objects may be exempted, if specially provided for in the charter. And this is still more clearly expressed, as follows: "We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it, may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a State to abandon it does not appear.

Such a case was not then before the court. There was no provision in the Providence Bank charter which exempted it from taxation, and in that case the court could presume no such intention.

But suppose, in the language of that great man, "a consideration sufficiently valuable to induce a partial release of it, and such release had been contained in the charter;" would not that have been held sufficient? And of the sufficiency of the consideration, whether it was a bonus paid by the bank, or in supplying a sound currency, the legislature would be the exclusive judges. This would constitute a contract which a legislature could not impair.

The above case is a strong authority against the defendants. The chief justice further says: "Any privileges which may exempt the corporation from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist." But if so expressed, do they not exist?

A case is cited from *The Stourbridge Canal v. Wheely*, 2 Barn. & Adol. 793, to show that no implications in favor of chartered rights are admissible. Lord Tenterden says: "That any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public; and the plaintiffs can claim nothing that is not clearly given them by the act." In the same opinion, his lordship said: "Now, it is quite certain that the company have no right expressly to receive any compensation, except the tonnage paid for goods carried through some of the canals or the locks on the canal, or the collateral cuts, and it is therefore incumbent upon them to show that they have a right clearly given by inference from some of the other clauses."

Neither this, the Rhode Island Bank case, nor the Charles River Bridge case, 11 Pet. 420, affords any aid to the doctrines maintained, with the single exception that a right set up under a grant must

clearly appear, and cannot be presumed; and this has not been controverted.

* That a State has power to make a contract which shall [* 389] bind it in future, is so universally held by the courts of the United States and of the States, that a general citation of authorities is unnecessary on the subject. *Dartmouth College v. Woodward*, 4 Wheat. 518; *Terrett v. Taylor*, 9 Cranch, 43; *Town of Pawlett*, 9 Cranch, 292.

Mr. Justice Blackstone says, 2 Bl. Com. 37: "That the same franchise that has before been granted to one, cannot be bestowed on another, because it would prejudice the former grant." In *The King v. Pasmore*, 3 Term R. 240, Lord Kenyon says, that an existing corporation cannot have another charter obtruded upon it, or accept the whole or any part of the new charter. The reason of this, it is said, is obvious. A charter is a contract, to the validity of which the consent of both parties is essential, and therefore it cannot be altered or added to without consent.

There is no constitutional objection to the exercise of the power to make a binding contract by a State. It necessarily exists in its sovereignty, and it has been so held by all the courts in this country. A denial of this is a denial of state sovereignty. It takes from the State a power essential to the discharge of its functions as sovereign. If it do not possess this attribute, it could not communicate it to others. There is no power possessed by it more essential than this. Through the instrumentality of contracts, the machinery of the government is carried on. Money is borrowed, and obligations given for payment. Contracts are made with individuals, who give bonds to the State. So in the granting of charters. If there be any force in the argument, it applies to contracts made with individuals, the same as with corporations. But it is said the State cannot barter away any part of its sovereignty. No one ever contended that it could.

A State, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land. This act, so far from parting with any portion of the sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right

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to select the objects of taxation and determine the amount? To deny either of these, is to take away state sovereignty.

[* 390] * It must be admitted that the State has the sovereign power to do this, and it would have the sovereign power to impair or annul a contract so made, had not the constitution of the United States inhibited the exercise of such a power. The vague and undefined and indefinable notion that every exemption from taxation or a specific tax, which withdraws certain objects from the general tax law, affects the sovereignty of the State, is indefensible.

There has been rarely, if ever, it is believed, a tax law passed by any State in the Union, which did not contain some exemptions from general taxation. The act of Ohio of the 25th of March, 1851, in the fifty-eighth section, declared that "the provisions of that act shall not extend to any joint-stock company which now is or may hereafter be organized, whose charter or act of incorporation shall have guaranteed to such company an exemption from taxation, or has prescribed any other as the exclusive mode of taxing the same." Here is a recognition of the principle now repudiated. In the same act, there are eighteen exemptions from taxation.

The federal government enters into an arrangement with a foreign State for reciprocal duties on imported merchandise, from the one country to the other. Does this affect the sovereign power of either State? The sovereign power in each was exercised in making the compact, and this was done for the mutual advantage of both countries. Whether this be done by treaty or by law, is immaterial. The compact is made, and it is binding on both countries.

The argument is, and must be, that a sovereign State may make a binding contract with one of its citizens, and, in the exercise of its sovereignty, repudiate it.

The constitution of the Union, when first adopted, made States subject to the federal judicial power. Could a State, while this power continued, being sued for a debt contracted in its sovereign capacity, have repudiated it in the same capacity? In this respect, the constitution was very properly changed, as no State should be subject to the judicial power generally.

Much stress was laid on the argument, and in the decisions of the supreme court, on the fact that the banks paid no bonus for their charters, and that no contract can be binding which is not mutual.

This is a matter which can have no influence in deciding the legal question. The State did not require a bonus, but other requisitions are found in the charter, which the legislature deemed sufficient, and this is not questionable by any other authority. The obligation is

as strong on the State, from *the privileges granted and [* 391] accepted, as if a bonus had been paid.

Another assumption is made, that the banks are taxed as property is taxed in the hands of individuals. No deduction, it appears, is made from banks on account of debts due to depositors or others, whilst debts due by an individual are deducted from his credits. If this be so, it places banks on a very different footing from individuals.

The power of taxation has been compared to that of eminent domain, and it is said, as regards the question before us, they are substantially the same. These powers exist in the same sovereignty, but their exercise involves different principles. Property may be appropriated for public purposes, but it must be paid for. Taxes are assessed on property for the support of the government under a legislative act.

We were not prepared for the position taken by the supreme court of Ohio, that "no control over the right of taxation by the States was intended to be conferred upon the general government by the section referred to, or any other, except in relation to duties upon imports and exports." This has never been pretended by any one. The section referred to gives the federal government no power over taxation by a State. Such an idea does not belong to the case, and the argument used, we submit, is not legitimate. We have power only to deal with contracts under the tenth section of the first article of the constitution, whether made by a State or an individual; if such contract be impaired by an act of the State, such act is void, as the power is prohibited to the State. This is the extent of our jurisdiction. As well might it be contended, under the above section, that no power was given to the federal government to regulate the numberless internal concerns of a State which are the subjects of contracts. With those concerns we have nothing to do; but when contracts growing out of them are impaired by an act of the State, under the federal constitution, we inquire whether the act complained of is in violation of it.

The rule observed by this court, to follow the construction of the statute of the State by its supreme court, is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a statute of the State is received as a part of the statute. But we are called in the case before us, not to carry into effect a law of the State, but to test the validity of such a law by the constitution of the Union. We are exercising an appellate jurisdiction. The decision of the supreme court of the State is before us for revision, and if their construction of the contract in question im-

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pairs its obligation, we are required to reverse their judgment. [* 392] To follow the *construction of a state court in such a case, would be to surrender one of the most important provisions in the federal constitution.

There is no jurisdiction which we are called to exercise, of higher importance, nor one of deeper interest to the people of the States. It is, in the emphatic language of Chief Justice Marshall, a bill of rights to the people of the States, incorporated into the fundamental law of the Union. And whilst we have all the respect for the learning and ability which the opinions of the judges of the supreme court of the State command, we are called upon to exercise our own judgments in the case.

In the discussion of the principles of this case, we have not felt ourselves at liberty to indulge in general remarks on the theory of our government. That is a subject which belongs to a convention for the formation of a constitution; and, in a limited view, to the law-making power. Theories depend so much on the qualities of the human mind, and these are so diversified by education and habit, as to constitute an unsafe rule for judicial action. Our prosperity, individually and nationally, depends upon a close adherence to the settled rules of law, and especially to the great fundamental law of the Union.

Having considered this case in its legal aspects, as presented in the arguments of counsel, and in the views of the supreme court of the State, and especially as regards the rights of the bank under the charter, we are brought to the conclusion, that in the acceptance of the charter, on its terms, and the payment of the capital stock, under an agreement to pay six per cent. semiannually on the dividends made, deducting expenses and ascertained losses, in lieu of all taxes, a contract was made binding on the State and on the bank; and that the tax law of 1851, under which a higher tax has been assessed on the bank than was stipulated in its charter, impairs the obligation of the contract, which is prohibited by the constitution of the United States, and, consequently, that the act of 1851, as regards the tax thus imposed, is void. The judgment of the supreme court of Ohio, in giving effect to that law, is, therefore, reversed.

Catron, J., Daniel, J., and Campbell, J., dissented.

TANEY, C. J., gave a separate opinion, as follows:—

I concur in the judgment in this case. I think that by the sixtieth section of the act of 1845, the State bound itself by contract to levy no higher tax than the one therein mentioned, upon the banks or stocks in the banks which organized under that law during the con-

tinuance of their charters. In my judgment, * the words [* 393] used are too plain to admit of any other construction.

But I do not assent altogether to the principles or reasoning contained in the opinion just delivered. The grounds upon which I hold this contract to be obligatory on the State, will appear in my opinion in the case of The Ohio Life Insurance and Trust Company, also decided at the present term.

CATRON, J. This is a contest between the State of Ohio and a portion of her banking institutions, organized under a general banking law, passed in 1845. She was then a wealthy and prosperous community, and had numerous banks which employed a large capital, and were taxed by the general laws five per cent. on their dividends, being equal to thirty cents on each hundred dollars' worth of stock, supposing it to be at par value. But this was merely a state tax, payable into the state treasury. The old banks were liable to taxes for county purposes, besides; and when located in cities or towns, for corporation taxes also. These two items usually amounted to much more than the state tax.

Such was the condition of Ohio when the general banking law was passed in 1845. By this act, any number of persons not less than five might associate together, by articles, to carry on banking.

The State was laid off into districts, and the law prescribes the amount of stock that may be employed in each. Every county was entitled to one bank, and some to more. Commissioners were appointed to carry the law into effect. It was the duty of this board of control to judge of the articles of association, and other matters necessary to put the banks into operation. Any company might elect to become a branch of the state bank, or to be a separate bank, disconnected with any other. Fifty thousand dollars was the minimum, and five hundred thousand the maximum, that could be employed in any one proposed institution.

By the fifty-first section, each of the banking companies authorized to carry on business was declared to be a body corporate with succession to the first day of May, 1866, with general banking powers; with the privilege to issue notes of one dollar and upwards, to one hundred dollars; and each bank was required to have "on hand in gold and silver coin, or their equivalent, one half at least of which shall be in gold and silver coin in its vault, an amount equal to thirty per cent. of its outstanding notes of circulation; and whenever the specie on hand, or its equivalent, shall fall below twenty per cent. of the outstanding * notes, then no more notes shall be circulated." [* 394] The equivalent to specie, meant deposits that might be

drawn against in the hands of eastern banks, or bankers of good credit. In this provision consisted the great value of the franchise.

The 59th section declares that semiannual dividends shall be made by each bank of its profits, after deducting expenses; and the 60th section provides, that six per cent. per annum of these profits shall be set off to the State, "which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof on account of stock owned therein, would otherwise be subject." This was equal to thirty-six cents per annum on each hundred dollars of stock subscribed, supposing it to yield six per cent. interest.

By an act of 1851, it was declared that bank stock should be assessed at its true value, and that it should be taxed for state, county, and city purposes, to the same extent that personal property was required to be taxed at the place where the bank was located. As this rate was much more than that prescribed by the 60th section of the act of 1845, the bank before us refused to pay the excess, and suffered herself to be sued by the tax collector, relying on the 60th section, above recited, as an irrepealable contract, which stood protected by the constitution of the United States.

It is proper to say that the trifling sum in dispute in this cause is the mere ground of raising the question between the State of Ohio and some fifty of her banks, claiming exemption under the act of 1845.

The taxable property of these banks is about eighteen millions of dollars, according to the auditor's report of last year, and which was used on the argument of this cause, by both sides. Of course, the state officers, and other tax payers, assailed the corporations claiming the exemption, and various cases were brought before the supreme court of Ohio, drawing in question the validity of the act of 1851, in so far as it increased the taxes of the banks beyond the amount imposed by the 60th section of the act of 1845. The state court sustained the act of 1851, from which decision a writ of error was prosecuted, and the cause brought to this court.

The opinions of the state court have been laid before us, for our consideration; and on our assent or dissent to them, the case depends.

The first question made and decided in the supreme court of Ohio was, whether the 60th section of the act of 1845, purported to be, in its terms, a contract not further to tax the banks organized under it during the entire term of their existence? The court held that it

imported no such contract; and with this opinion I concur.

[* 395] * The question was examined by the judge who delivered the unanimous opinion of the court, in the case of *Debolt v.*

The Ohio Life Insurance and Trust Company, 1 Ohio State Reports, (N. S.) 564, with a fairness, ability, and learning calculated to command the respect of all those who have his opinion to review; and which opinion has, as I think, construed the 60th section truly. But, as my brother Campbell has rested his opinion on this section without going beyond it, and as I concur in his views, I will not further examine that question, but adopt his opinion in regard to it.

The next question, decided by the state court is of most grave importance; I give it in the language of the state court: "Had the general assembly power, under the constitution then in force, permanently to surrender, by contract, within the meaning and under the protection of the constitution of the United States, the right of taxation over any portion of the property of individuals, otherwise subject to it?" On which proposition the court proceeds to remark:—

"Our observations and conclusions upon this question, must be taken with reference to the unquestionable facts, that the act of 1851 was a *bonâ fide* attempt to raise revenue by an equal and uniform tax upon property, and contained no covert attack upon the franchise of these institutions. That the surrender did not relate to property granted by the State, so as to make it a part of the grant for which a consideration was paid; the State having granted nothing but the franchise, and the tax being upon nothing but the money of individuals invested in the stock; and that no bonus or gross sum was paid in hand for the surrender, so as to leave it open to controversy, that reasonable taxes, to accrue in future, were paid in advance of their becoming due. What effect a different state of facts might have, we do not stop to inquire. Indeed, if the attempt has here been made, it is a naked release of sovereign power without any consideration or attendant circumstance to give it strength or color; and, so far as we are advised, is the first instance where the rights and interests of the public have been entirely overlooked."

"Under these circumstances, we feel no hesitation in saying the general assembly was incompetent to such a task. This conclusion is drawn from a consideration of the limited authority of that body, and the nature of the power claimed to be abridged.

"That political sovereignty, in its true sense, exists only with the people, and that government is 'founded on their sole authority,' and subject to be altered, reformed, or abolished only by them, is a political axiom upon which all the American * governments [* 396] have been based, and is expressly asserted in the bill of rights. Such of the sovereign powers with which they were invested as they deem necessary for protecting their rights and liberties, and securing their independence, they have delegated to governments

created by themselves, to be exercised in such manner and for such purposes as were contemplated in the delegation. That these powers can neither be enlarged or diminished by these repositories of delegated authority, would seem to result, inevitably, from the fundamental maxim referred to, and to be too plain to need argument or illustration.

“ If they could be enlarged, government might become absolute; if they could be diminished or abridged, it might be stripped of the attributes indispensable to enable it to accomplish the great purposes for which it was instituted. And, in either event, the constitution would be made either more or less than it was when it came from the hands of its authors; being changed and subverted without their action or consent. In the one event its power for evil might be indefinitely enlarged; while in the other its capacity for good might be entirely destroyed; and thus become either an engine of oppression, or an instrument of weakness and pusillanimity.

“ The government created by the constitution of this State, (Ohio,) although not of enumerated, is yet one of limited powers. It is true, the grant to the general assembly of ‘ legislative authority ’ is general; but its exercise within that limit is necessarily restrained by the previous grant of certain powers to the federal government, and by the express limitations to be found in other parts of the instrument. Outside of that boundary, it needed no express limitations, for nothing was granted. Hence this court held, in *Cincinnati, Wilmington, &c. R. R. v. Clinton Co.* 1 Ohio State R. 77, that any act passed by the general assembly not falling fairly within the scope of ‘ legislative authority,’ was as clearly void as though expressly prohibited. So careful was the convention to enforce this principle, and to prevent the enlargement of the granted powers by construction or otherwise, that they expressly declared in art. 8, § 28: ‘ To guard against the transgression of the high powers we have delegated, we declare that all powers, not hereby delegated, remain with the people.’ When, therefore, the exercise of any power by that body is questioned, its validity must be determined from the nature of the power, connected with the manner and purpose of its exercise. What, then, is the taxing power? And to what extent, and for what purposes has it been conferred upon the legislature? That it is a power incident to sovereignty — ‘ a power of vital importance to the very existence of every government ’ — has been as often de-
[* 397] clared as it has been spoken * of. Its importance is not too strongly represented by Alexander Hamilton, in the 30th number of *The Federalist*, when he says: ‘ Money is with propriety considered as the vital principle of the body politic; as that which

sustains its life and motion, and enables it to perform its most important functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish.'

"This power is not to be distinguished, in any particular material to the present inquiry, from the power of eminent domain. Both rest upon the same foundation — both involve the taking of private property — and both, to a limited extent, interfere with the natural right guaranteed by the constitution, of acquiring and enjoying it. But, as this court has already said, in the case referred to, 'neither can be classed amongst the independent powers of government, or included in its objects and ends.' No government was ever created for the purpose of taking, taxing, or otherwise interfering with the private property of its citizens. 'But charged with the accomplishment of great objects necessary to the safety and prosperity of the people, these rights attach as incidents to those objects, and become indispensable means to the attainment of those ends.' They can only be called into being to attend the independent powers, and can never be exercised without an existing necessity.

"To sustain this power in the general assembly, would be to violate all the great principles to which I have alluded. It would affirm its right to deal in, and barter away its sovereign right of the State, and thereby, in effect, to change the constitution. When the general assembly of 1845 convened, it found the State in the unquestionable possession of the sovereign right of taxation, for the accomplishment of its lawful objects, extending to 'all the persons and property belonging to the body politic.'"

When its successor convened, in 1846, under the same constitution, and to legislate for the same people, if this defence is available, it found the State shorn of this power over fifteen or twenty millions of property, still within its jurisdiction and protected by its laws. This and each succeeding legislature had the same power to surrender the right, as to any and all other property; until at length the government, deprived of every thing upon which it could operate to raise the means to attain * its necessary ends, by [* 398] the exercise of its granted powers, would have worked its own inevitable destruction, beyond all power of remedy, either by the legislature or the people. It is no answer to this to say that con-

fidence must be reposed in the legislative body, that it will not thus abuse the power.

“ But, in the language of the court, in *McCulloch v. Maryland*, 4 Wheat. 316, ‘ is this a case of confidence ? ’ ”

“ For every surrender of the right to tax particular property, not only tends to paralyze the government, but involves a direct invasion of the rights of property, of the balance of the community ; since the deficiency, thus created, must be made up by larger contributions from them to meet the public demand.”

The foregoing are some of the reasonings of the state court on the consideration here involved. With these views I concur, and will add some of my own. The first is : “ That acts of parliament derogatory from the power of subsequent legislatures, are not binding. Because, (as Blackstone says,) the legislature being in truth the sovereign power, is always equal, always absolute ; and it acknowledges no superior on earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with proper contempt these restraining clauses which endeavor to tie up the hands of succeeding legislatures. When you repeal the law itself, says he, you at the same time repeal the prohibitory clause which guards against repeal.”

If this is so under the British government, how is it in Ohio ? Her supreme court holds that the state constitution of 1802 expressly prohibited one legislature from restraining its successors by the indirect means of contracts exempting certain property, from taxation. The court says : Power to exempt property, was reserved to the people ; they alone could exempt, by an organic law. That is to say, by an amended constitution. The clause mainly relied on declares “ that all powers not delegated, remain with the people.” Now it must be admitted that this clause has a meaning ; and it must also be conceded, as I think, that the supreme court of Ohio, has the uncontrollable right to declare what that meaning is ; and that this court has just as little right to question that construction as the supreme court of Ohio has to question our construction of the constitution of the United States.

In my judgment, the construction of the court of Ohio is proper ; but, if I believed otherwise, I should at once acquiesce. Let us look at the matter fairly and truly as it is, and see what a different course on the part of this court would lead to ; nay, what Ohio is bound to do in self-defence and for self-preservation, under the circumstances.

[* 399] In 1845, a general banking law is sought at the hands

of the legislature, where five dollars in paper can be circulated for every dollar in specie in the bank, or on deposit, in eastern banks or with brokers. One dollar notes are authorized; every county in the State is entitled to a bank, and the large ones to several; the tempting lure is held out of six per cent. interest on five hundred dollars for every hundred dollars paid in as stock: thus obtaining a profit of twenty-four dollars on each hundred dollars actually paid in. That such a bill would have advocates enough to pass it through the legislature, all experience attests; and that the slight tax of thirty-six cents on each hundred dollars' worth of stock subscribed and paid was deemed a privilege, when the existing banks and other property were taxed much higher, is plainly manifest. As was obvious, when the law passed, banks sprang up at once — some fifty in number having a taxable basis last year of about eighteen millions. The elder and safer banks were, of course, driven out, and new organizations sought under the general law, by the stockholders. From having constructed large public works, and made great expenditures, Ohio has become indebted so as to require a very burdensome tax on every species of property; this was imposed by the act of 1851, and on demanding from these institutions their equal share, the State is told that they were protected by a contract made with the legislature of 1845, to be exempt from further taxation, and were not bound by the late law, and, of course, they were sued in their own courts. The supreme court holds that, by the express terms of the state constitution, no such contract could be made by the legislature of 1854, to tie up the hands of the legislature of 1851. And then the banks come here and ask our protection against this decision, which declares the true meaning of the state constitution. It expressly guarantees to the people of Ohio the right to assemble, consult, "and instruct their representatives for their common good;" and then "to apply to the legislature for a redress of grievances." It further declares, that all powers not conferred by that constitution on the legislature are reserved to the people. Now, of what consequence or practical value will these attempted securities be, if one legislature can restrain all subsequent ones by contracting away the sovereign power to which instructions could apply?

The question, whether the people have reserved this right so as to hold it in their own hands, and thereby be enabled to regulate it by instructions to a subsequent legislature, (or by a new constitution,) is a question that has been directly raised only once, in any State of the Union, so far as I know. In the case of *Brewster v. Hough*, 10 New Hampshire Reports, 138, it * was raised, [* 400] and Chief Justice Parker, in delivering the opinion of the

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court in a case in all respects like the one before us, says: "That it is as essential that the public faith should be preserved inviolate as it is that individual grants and contracts should be maintained and enforced. But there is a material difference between the right of a legislature to grant lands, or corporate powers, or money, and a right to grant away the essential attributes of sovereignty or rights of eminent domain. These do not seem to furnish the subject-matter of a contract."

This court sustained the principle announced by the supreme court of New Hampshire, in the *West River Bridge* case, 6 How. 507. A charter for one hundred years, incorporating a bridge company, had been granted; the bridge was built and enjoyed by the company. Then another law was passed authorizing public roads to be laid out, and free bridges to be erected; the commissioners appropriated the *West River Bridge* and made it free; the supreme court of Vermont sustained the proceeding on a review of that decision. And this court held that the first charter was a contract securing the franchises and property in the bridge to the company, but that the first legislature could not cede away the sovereign right of eminent domain, and that the franchises and property could be taken for the uses of free roads and bridges, on compensation being made.

Where the distinction lies, involving a principle, between that case and this, I cannot perceive, as every tax-payer is compensated by the security and comfort government affords. The political necessities for money are constant and more stringent in favor of the right of taxation; its exercise is required daily to sustain the government. But in the essential attributes of sovereignty, the right of eminent domain and the right of taxation are not distinguishable.

If the *West River Bridge* case can be sound constitutional law (as I think it is) then it must be true that the supreme court of Ohio is right in holding that the legislature of 1845 could not deprive the legislature of 1851 of its sovereign powers or of any part of them.

It is insisted, that the case of *The State of Ohio v. The Commercial Bank of Cincinnati*, 7 Ohio, 125, has held otherwise. This is clearly a mistake. The State in that case raised no question as to the right of one legislature to cede the sovereign power to a corporation, and tie up the hands of all subsequent legislatures: no such constitutional question entered into the decision; nor is any allusion made to it in the opinion of the court. It merely construed the acts of assembly, and held that a contract did exist on the ground that by

the charter the bank was taxed four per cent.; and therefore
[* 401] the charter must * be enforced, as this rate of taxation adhered to the charter, and excluded a higher imposition.

It would be most unfortunate for any court, and especially for this one, to hold that a decision affecting a great constitutional consideration, involving the harmony of the Union, (as this case obviously does,) should be concluded by a decision in a case where the constitutional question was not raised by counsel; and so far from being considered by the court, was never thought of; such a doctrine is altogether inadmissible. And in this connection I will say, that there are two cases decided by this court, (and relied on by the plaintiff in error,) in regard to which similar remarks apply. The first one is that of *New Jersey v. Wilson*, 7 Cranch, 164. An exchange of lands took place in 1758 between the British colony of New Jersey and a small tribe of Indians residing there. The Indians had the land granted to them by an act of the colonial legislature, which exempted it from taxes. They afterwards sold it, and removed. In 1804, the state legislature taxed these lands in the hands of the purchasers; they were proceeded against for the taxes, and a judgment rendered, declaring the act of 1804 valid. In 1812, the judgment was brought before this court, and the case submitted on the part of the plaintiff in error without argument; no one appearing for New Jersey. This court held the British contract with the Indians binding; and, secondly, that it run with the land which was exempt from taxation in the hands of the purchasers.

No question was raised in the supreme court of New Jersey, nor decided there, or in this court, as to the constitutional question of one legislature having authority to deprive a succeeding one of sovereign power. The question was not considered, nor does it seem to have been thought of in the state court or here.

The next case is *Gordon's case*, 3 How. 144. What questions were there presented on the part of the State of Maryland, does not appear in the report of the case, but I have turned to them in the record, to see how they were made in the state courts. They are as follows:—

“1. That at the time of passing the general assessment law of 1841, there was no contract existing between the State and the banks, or any of them, or the stockholders therein or any of them, by which any of the banks or stockholders can claim an exemption from the taxation imposed upon them by the said act of 1841.”

“2. That the contract between the State and the old banks, if there be any contract, extends only to an exemption from further ‘taxes or burdens,’ of the corporate privileges of banking; *and does not exempt the property, either real or personal, [* 402] of said banks, or the individual stockholders therein.”

“3. That even if the contract should be construed to exempt the

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real and personal property of the old banks, and the property of the stockholders therein, yet such exemption does not extend to the new banks, or those chartered since 1830, and, moreover, that the power of revocation, in certain cases in these charters, reserves to the State the power of passing the general assessment law."

"4. That the imposition of a tax of twenty cents upon every one hundred dollars' worth of property, upon both the old and new banks, under the said assessment law, is neither unequal nor oppressive, nor in violation of the bill of rights.

"5. That taxation upon property within the State, wherever the owners may reside, is not against the bill of rights."

On these legal propositions the opinion here given sets out by declaring that, "the question, however, which this court is called on to decide, and to which our decision will be confined, is, Are the shareholders in the old and new banks, liable to be taxed under the act of 1841, on account of the stock which they own in the banks."

The following paragraph is the one relied on as adjudging the question, that the taxing power may be embodied in a charter and contracted away as private property, to wit: "Such a contract is a limitation on the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax on the franchise."

"But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the State, was repeatedly asked in the course of the argument. The reason is, that every one buys land, subject in his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the State. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price."

As the case came up from the supreme court of Maryland, this court had power merely to reëxamine the questions raised in the court below, and decided there. All that is asserted in the opinion beyond this is outside of the case of which this court had jurisdiction, and is only so far to be respected as it is sustained by sound reasoning; but its *dicta* are not binding as authority; and so the supreme court of Maryland held in the case of *The Mayor, &c., of Baltimore v. The Baltimore and Ohio Railroad Company*, 6 Gill. 288.

The State of Maryland merely asked to have her statutes [* 403] * construed, and if, by their true terms, she had promised to exempt the stockholders of her banks from taxation, then she claimed no tax of them. She took no shelter under constitutional objections, but guardedly avoided doing so.

If an expression of opinion is authority that binds, regardless of the case presented, then we are as well bound the other way, by another quite equal authority. In the case of *East Hartford v. Hartford Bridge Company*, 10 How. 535, Mr. Justice Woodbury, delivering the opinion of the court, says: The case of *Goszler v. The Corporation of Georgetown*, 6 Wheat. 596, 598, "appears to settle the principle that a legislative body cannot part with its powers by any proceeding so as not to be able to continue the exercise of them. It can, and should, exercise them again and again, as often as the public interests require."

"Its members are made by the people agents or trustees for them on this subject, and can possess no authority to sell or grant their power over the trust to others."

The Hartford case was brought here from the supreme court of Connecticut, by a writ of error, on the ground that East Hartford held a ferry right secured by a legislative act that was a private contract. But this court held, among other things, that, by a true construction of the state laws, no such contract existed; so that this case cannot be relied on as binding authority more than Gordon's case. If fair reasoning and clearness of statement are to give any advantage, then the Hartford case has that advantage over Gordon's case.

It is next insisted that the state legislatures have in many instances, and constantly, discriminated among the objects of taxation; and have taxed and exempted according to their discretion. This is most true. But the matter under discussion is aside from the exercise of this undeniable power in the legislature. The question is, whether one legislature can, by contract, vest the sovereign power of a right to tax, in a corporation as a franchise, and withhold the same power that legislature had to tax, from all future ones? Can it pass an irrepealable law of exemption?

General principles, however, have little application to the real question before us, which is this: Has the constitution of Ohio withheld from the legislature the authority to grant, by contract with individuals, the sovereign power; and are we bound to hold her constitution to mean as her supreme court has construed it to mean? If the decisions in Ohio have settled the question in the affirmative, that the sovereign political power is not the subject of an irrepealable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conformity * that I suppose could exist with any one is, [* 404] that the construction is not settled. How is the fact?

The refusal of some fifty banks to pay their assessed portion of the revenue for the year 1851, raised the question for the first time in the

State of Ohio ; since then the doctrine has been maintained in various cases, supported unanimously by all the judges of the supreme court of that State, in opinions deeply considered, and manifesting a high degree of ability in the judges, as the extract from one of them, above set forth, abundantly shows. If the construction of the state constitution is not settled, it must be owing to the recent date of the decisions. An opinion proceeding on this hypothesis will, as I think, involve our judgment now given in great peril hereafter ; for if the courts of Ohio do not recede, but firmly adhere to their construction until the decisions, now existing, gain maturity and strength by time, and the support of other adjudications conforming to them, then it must of necessity occur that this court will be eventually compelled to hold that the construction is settled in Ohio ; when it must be followed to avoid conflict between the judicial powers of that State and the Union, an evil that prudence forbids.

1. The result of the foregoing opinion is, that the sixtieth section of the general banking law of 1845 is, in its terms, no contract professing to bind the legislature of Ohio not to change the mode and amount of taxation on the banks organized under this law ; and for this conclusion I rely on the reasons stated by my brother Campbell, in his opinion, with which I concur.

2. That, according to the constitution of all the States of this Union, and even of the British parliament, the sovereign political power is not the subject of contract so as to be vested in an irrepealable charter of incorporation, and taken away from, and placed beyond the reach of, future legislatures ; that the taxing power is a political power of the highest class, and each successive legislature having vested in it, unimpaired, all the political powers previous legislatures had, is authorized to impose taxes on all property in the State that its constitution does not exempt.

It is undeniably true that one legislature may by a charter of incorporation, exempt from taxation the property of the corporation in part, or in whole, and with or without consideration ; but this exemption will only last until the necessities of the State require its modification or repeal.

3. But if I am mistaken in both these conclusions, then I am of opinion that, by the express provisions of the constitution of Ohio, of 1802, the legislature of that State had withheld from [* 405] * its powers the authority to tie up the hands of subsequent legislatures in the exercise of the powers of taxation, and this opinion rests on judicial authority that this court is bound to follow ; the supreme court of Ohio having held, by various solemn and unanimous decisions, that the political power of taxation was

one of those reserved rights intended to be delegated by the people to each successive legislature, and to be exercised alike by every legislature according to the instructions of the people. This being the true meaning of the nineteenth and twenty-eighth sections of the bill of rights, forming part of the constitution of 1802; one section securing the right of instructing representatives, and the other protecting reserved rights held by the people.

Whether this construction given to the state constitution is the proper one, is not a subject of inquiry in this court; it belongs exclusively to the state courts, and can no more be questioned by us than state courts and judges can question our construction of the constitution of the United States. For these reasons, I am of opinion that the judgment of the supreme court of Ohio should be affirmed.

DANIEL, J. In the views so clearly taken by my brother Campbell, of the character of the legislation of Ohio, impeached by the decision of the court, I entirely coincide. I will add to the objections he has so well urged to the jurisdiction of this court, another which, to my mind at least, is satisfactory; it is this, that one of the parties to this controversy being a corporation created by a State, this court can take no cognizance, by the constitution, of the acts, or rights, or pretensions of that corporation.

CAMPBELL, J. I dissent from the opinion of the court.

The question disclosed by the record, is contained in the sixtieth section of an act of the general assembly of Ohio, "to incorporate the State Bank of Ohio and other banking companies of that State," adopted February, 1845.

The section provides, that every banking company organized by the act, or complying with its provisions, shall semiannually, at designated days, set off to the State, six per cent. of the net profits for the six months next preceding, "which sum or amount so set off shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject;" and the cashier was required to report the amount to the auditor and to pay it to the treasurer; but in computing the profits of the company for the purposes * aforesaid, [* 406] the interest received on the certificates of the funded debt held by the company, or deposited with and transferred to the treasurer of the State, or to the board of control by such company, shall not be taken into the account." I have extracted the last clause merely because it forms a part of the section.

It is not usual for governments to levy taxes upon the certificates

of their funded debt, and Ohio had, in an early statute, forbidden taxation of hers. This clause was a cumulative precaution, wholly unnecessary. Swan Stats. 747, § 5.

The case lies in the solution of the question, whether the clause directing the banks to set apart semiannually, upon the profits for the six months preceding, six per cent. in lieu of all other taxes to which the company or the stockholders would otherwise be subject on account of the stock, institutes an unalterable rule of taxation for the whole time of the corporate existence of these banks? The general assembly of Ohio thinks otherwise, and has imposed a tax upon the stock of the banks, corresponding with the taxes levied upon other personal property held in the State. The payment of this tax has been resisted by the banks. The supreme court of Ohio, by its judgment, affirms the validity of the act of the general assembly, and has condemned the bank to the payment. This judgment is the matter of consideration.

The section of the act above cited furnishes a rule of taxation, and while it remains in force, a compliance with it relieves the banks from all other taxes to which they would otherwise be subject. Such is the letter of the section.

The question is, has the State of Ohio inhibited herself from adopting any other rule of taxation either for amount or mode of collection, while these banks continue in existence? It is not asserted that such a prohibition has been imposed by the express language of the section. The term for which this rule of taxation is to continue is not plainly declared. The amounts paid according to it discharge the taxes for the antecedent six months. Protection is given in advance of exaction.

The clause in the section, that this "sum or amount, so set off, shall be in lieu of all taxes to which such company or the stockholders thereof would otherwise be subject," requires an addition to ascertain the duration of the rule. It may be completed in adding, "by the existing laws for the taxation of banks," or "till otherwise provided by law," or at "the date of such apportionment or dividend." Or, following the argument of the banks, in adding, "during the existence of the banks." Whether we shall select from the one series of expressions, leading to one result, or the expression leading to another altogether different, depends upon the rules of interpretation applicable to the subject.

[* 407] * The first inquiries are of the relations of the parties to the supposed contract to its subject-matter, and the form in which it has been concluded. The sixtieth section of the act of 1845, was adopted by the general assembly of Ohio in the exercise

of legislative powers, as a part of its public law. The powers of that assembly in general, and that of taxation especially, are trust powers, held by them as magistrates, in deposit, to be returned, after a short period, to their constituents, without abuse or diminution.

The nature of the legislative authority is inconsistent with an inflexible stationary system of administration. Its office is one of vigilance over the varying wants and changing elements of the association, to the end of ameliorating its condition. Every general assembly is organized with the charge of the legislative powers of the State; each is placed under the same guidance, experience, and observation; and all are forbidden to impress finally and irrevocably their ideas or policy upon the political body. Each, with the aid of an experience, liberal and enlightened, is bound to maintain the State in the command of all the resources and faculties necessary to a full and unshackled self-government. No implication can be favored which convicts a legislature of a departure from this law of its being.

The subject-matter of this section is the contributive share of an important element of the productive capital of the State to the support of its government. The duty of all to make such a contribution in the form of an equal and apportioned taxation, is a consequence of the social organization. The right to enforce it is a sovereign right, stronger than any proprietary claim to property. The amount to be taken, the mode of collection, and the duration of any particular assessment or form of collection, are questions of administration submitted to the discretion of the legislative authority; and variations must frequently occur, according to the mutable conditions, circumstances, or policy of the State. These conditions are regulated for the time, in the sixtieth section of this act. That section comes from the lawmaker, who ordains that the officers of certain banking corporations, at stated periods, shall set apart from their property a designated sum as their share of the public burden, in lieu of other sums or modes of payment to which they would be subject; but there is no promise that the same authority may not, as it clearly had a right to do, apportion a different rate of contribution. I will not say that a contract may not be contained in a law, but the practice is not to be encouraged, and courts discourage the interpretation which discovers them. A common informer sues for a penalty, or a revenue officer makes a seizure under a promise that on conviction, the recovery shall be shared, and yet the State *discharges the forfeiture, or prevents the recovery by [*408] a repeal of the law violating thereby no vested right nor

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impairing the obligation of any contract. 5 Cranch, 281 ; 10 Wheat. 246 ; 6 Pet. 404.

A captor may be deprived of his share of prize-money, pensioners of their promised bounty, at any time before their payment. 2 Russ. and M. 35.

Salaries may be reduced, offices having a definite tenure, though filled, may be abolished, faculties may be withdrawn, the inducements to vest capital impaired and defeated by the varying legislation of a State, without impairing constitutional obligation. 8 How. 163 ; 10 *ibid.* 395 ; 3 *ibid.* 534 ; 8 Pet. 88 ; 2 Sanf. S. C. R. 355. The whole society is under the dominion of law, and acts, which seem independent of its authority, rest upon its toleration. The multifarious interests of a civilized state must be continually subject to the legislative control. General regulations, affecting the public order, or extending to the administrative arrangements of the State, must overrule individual hopes and calculations, though they may have originated in its legislation. It is only when rights have vested under laws that the citizen can claim a protection to them as property. Rights do not vest until all the conditions of the law have been fulfilled with exactitude during its continuance, or a direct engagement has been made, limiting legislative power over and producing an obligation. In this case, it may be conceded that at the end of every six months the payment then taken is a discharge for all antecedent liabilities for taxes. That there could be no retrospective legislation. But beyond this the concessions of the section do not extend.

A plain distinction exists between the statutes which create hopes, expectations, faculties, conditions, and those which form contracts. These banks might fairly hope that without a change in the necessities of the State, their quota of taxes would not be increased ; and that while payment was punctually made, the form of collection would not be altered. But the general assembly represents a sovereign, and as such designated this rule of taxation upon existing considerations of policy, without annexing restraints on its will, or abdicating its prerogative, and consequently was free to modify, alter, or repeal the entire disposition.

I have thus far considered the sixtieth section of the act as a distinct act, embodying a state regulation with the view of ascertaining its precise limitations.

I shall, however, examine the general scheme and object of the act, of which it forms a part, to ascertain whether a different signification can be given to it. Before doing so, it is a matter of consequence to ascertain on what principles the inquiry must be conducted.

* Three cases occurred in this court, before either of the [* 409] members who now compose it belonged to it, in which taxation acts of the States or its municipal authorities, involving questions of great feeling and interest, were pronounced invalid. In the last of these the court said: "That in a society like ours, with one supreme government for national purposes, and numerous state governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land, in its application to individuals." The court in each of these cases affirm, "that the sovereignty of the State extends to every thing which exists by its authority, or is introduced by its permission, and all on subjects of taxation." 2 Pet. 449; 9 Wheat. 738; 4 *ibid.* 316.

The limitations imposed by the court in these cases excited a deep and pervading discontent, and must have directed the court to a profound consideration of the question in its various relations. The case of *The Providence Bank v. Billings*, 4 Pet. 514, enabled the court to give a practical illustration of sincerity with which the principle I have quoted was declared. A bank, existing by the authority of a State legislature, claimed an immunity from taxation against the authority of its creator.

The court then said: "However absolute the right of an individual (to property) may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion is determined by the legislature." The court declared that the relinquishment of the power of taxation is never to be assumed. "The community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not plainly appear."

These principles were reaffirmed, their sphere enlarged, and their authority placed upon broad and solid foundations of constitutional law and general policy, in the opinion of this court, in the case of *The Charles River Bridge*, 11 Pet. 420. No opinion of the court more fully satisfied the legal judgment of the country, and consequently none has exercised more influence upon its legislation. The supreme court of Pennsylvania, speaking of these cases, says, "they are binding on the state courts not merely as precedents, and therefore proving what the law is, but as the deliberate judgment of

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[* 410] that tribunal *with whom the final decision of all such questions rests. The state courts have almost universally followed them. But no tribunal of the Union has acceded to the rule they lay down with a more earnest appreciation of its justice than did this court." 7 Har. 144; 10 Barr, 442.

The supreme court of Georgia says: "The decision, based as it is upon a subject particularly within the cognizance and jurisdiction of the supreme court of the United States, is entitled to the highest deference." And the eminent chief justice of that court adds, "that the proposition it establishes commands my entire assent and approbation." 9 Georgia, 517; 10 N. H. 138; 17 Conn. 454; 21 Verm. 590; 21 Ohio, (McCook's Rep.) 564; 9 Ala. 235; 9 Rob. 324; 4 Coms. 419; 6 Gill, 288.

The chief justice, delivering the opinion of this court in that case, quotes with approbation the principle, that the abandonment of the power of taxation ought not to be presumed in a case in which the deliberate purpose to do so did not appear, and says: "The continued existence of a government would be of no great value, if, by implications and presnptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power; nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same."

The court only declared those principles for which the commons of England had struggled for centuries, and which were only established by magnanimous and heroic efforts. The rules that public grants convey nothing by implication, are construed strictly in favor of the sovereign, do not pass any thing not described nor referred to, and when the thing granted is described, nothing else passes; that general words shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, were not the inventions of the craft of crown lawyers, but were established in contests with crown favorites, and impressed upon the administration, executive and judicial, as checks for the people. The invention of crown lawyers was employed about such phrases, as *ex speciali gratia*, *certa scientia mero motu*, and *non obstante*, to undermine the strength of such rules, and to enervate the force of wholesome statutes. A

writer of the seventeenth century says: "From the time of William * Rufus, our kings have thought they might alien- [*411] ate and dispose of the crown lands at will and pleasure; and in all ages, not only charters of liberty, but likewise letters-patent for lands and manors, have actually passed in every reign. Nor would it have been convenient that the prince's hands should have been absolutely bound up by any law, or that what had once got into the crown should have been forever separated from private possession. For then, by forfeitures and attainitures, he must have become lord of the whole soil in a long course of time. The constitution, therefore, seems to have left him free in this matter; but upon this tacit trust, (as he has all his other power,) that he shall do nothing which may tend to the destruction of his subjects. However, though he be thus trusted, it is only as head of the commonwealth; and the people of England have in no age been wanting to put in their claim to that to which they conceived themselves to have a remaining interest; which claims are the acts of resumption that from time to time have been made in parliament, when such gifts and grants were made as become burdensome and hurtful to the people. Nor can any government or State divest itself of the means of its own preservation; and if our kings should have had an unlimited power of giving away their whole revenue, and if no authority could have revoked such gifts, every profuse prince, of which we have had many in this kingdom, would have ruined his successor, and the people must have been destroyed with new and repeated taxes; for by our duty we are likewise to support the next prince. So that if no authority could look into this, a nation must be utterly undone without any way of redressing itself, which is against the nature and essence of any free establishment.

"Our constitution, therefore, seems to have been, that the king always might make grants, and that these grants, if passed according to the forms prescribed by the law, were valid and pleadable, against not only him, but his successors. However, it is likewise manifest that the legislative power has had an uncontested right to look into those grants, and to make them void whenever they were thought exorbitant."

Nor were they careless or indifferent to precautionary measures for the preservation of the revenues of the State from spoliation or waste. Official responsibility was established, and the lords high treasurer and chancellor, through whose offices the grants were to pass, were severally sworn "that they would neither know nor suffer the king's hurt, nor his disheriting, nor that the rights of his crown be distressed by any means as far forth as ye may let; and if ye may not let it, ye

shall make knowledge thereof clearly and explicitly to the king with your true advice and counsel."

[* 412] * The responsibility of these high officers, as the history of England abundantly shows, was something more than nominal; nor did the frequent enforcement of that rule of responsibility, nor the adoption by the judges of the stringent rules I have cited, protect the revenues of the state from spoliation. "The wickedness of men," continues this writer, "was either too cunning or too powerful for the wisdom of laws in being. And from time to time great men, ministers, minions, favorites, have broken down the fences contrived and settled in our constitution. They have made a prey of the commonwealth, plumed the prince, and converted to their own use what was intended for the service and preservation of the state. That to obviate this mischief, the legislative authority has interposed with inquiries, accusations, and impeachments, till at last such dangerous heads were reached." Davenant's *Dis. passim*.

Nor let it be said that this history contains no lessons nor instructions suitable to our condition. The discussions before this court in the Indiana railroad and the Baltimore railroad cases exposed to us the sly and stealthy arts to which state legislatures are exposed, and the greedy appetites of adventurers, for monopolies and immunities from the state right of government. We cannot close our eyes to their insidious efforts to ignore the fundamental laws and institutions of the States, and to subject the highest popular interests to their central boards of control and directors' management.

This is not the time for the relaxation of those time-honored maxims, under the rule of which free institutions have acquired their reality, and liberty and property their most stable guarantees. The supreme court of Pennsylvania says, with great force, "that if acts of incorporation are to be so construed as to make them imply grants of privileges, immunities, and exemptions, which are not expressly given, every company of adventurers may carry what they wish, without letting the legislature know their designs. Charters would be framed in doubtful or ambiguous language, on purpose to deceive those who grant them; and laws, which seem perfectly harmless on their face, and which plain men would suppose to mean no more than what they say, might be converted into engines of infinite mischief. There is no safety to the public interest except in the rule which declares that the privileges not expressly granted are withheld." 7 Harris, 144.

The principles of interpretation, contained in these cases, control the decision of this, if applied to this act. Indeed, the argument of the plaintiff rests upon rules created for, and adapted to, a class of

statutes entirely dissimilar. We were invited to consider the antecedent legislation of Ohio, in reference to its *banks, [*413] the discouraging effects of that legislation, and then to deal with this act, as a medicinal and curative measure ; as an act recognizing past error, and correcting for the future the consequences. It is proper to employ this argument to its just limit. The legislation of Ohio since 1825 certainly manifests a distinct purpose of the State to maintain its powers over these corporations, in the matter of taxation, unimpaired. With a very few exceptions this appears in all the statutes. It is seen in the act of 1825, in the charters granted in 1834, in the acts of 1841-2-3, the last two being acts embracing the whole subject-matter of banking. It is said this austerity was the source of great mischief, depreciated the paper currency of the State, and occasioned distress to the people, and that the change apparent in the act of 1845, was the consequence.

The existence of a consistent and uniform purpose for a long period is admitted. The abandonment of such a purpose, and one so in harmony with sound principles of legislation, cannot be presumed. If the application of these principles in Ohio was productive of mischief, we should have looked for an explicit and unequivocal disclaimer. We have seen that the act contains no renunciation of this important power. And it may be fairly questioned whether the people of Ohio would have sanctioned such a measure. I know of no principle which enables me to treat the sixtieth section of this act as a remedial statute. Even the dissenting opinions in the Charles River and Louisa Railroad cases, which have formed the repertory from which the arguments of the plaintiffs have been derived, do not in terms declare such a rule, and the opinions delivered by the authority of the court repel such a conclusion. Nor can I consider the decision in 7 Ohio, 125, of consequence in this discussion. That case was decided upon a form of doctrine which, after the judgments of this court before cited, had no title to any place in the legal judgment of the country. The case was decided in advance of the most important and authoritative of those decisions. It is not surprising to hear that the judges who gave the judgment, afterwards renounced its principle, or that another state court has disapproved it, 7 Harris, 144, or that it has not been followed in kindred cases, 11 Ohio, 12, 393; 19 *ibid.* 110; 21 *ibid.* (McCook,) 563, 604, 626; and at the first time, when it came up for revision, it was overruled.

It remains for me to consider the act of 1845, its purpose and details, in connection with the sixtieth section of the act, to ascertain whether it is proper to assume that the State has relinquished its rights of taxation over the banking capital of the State.

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The act of 1845 was designed to enable any number, not [* 414] * fewer than five persons, to form associations to carry on the business of banking.

The legislature determined the whole amount of the capital which should be employed under the act, that it should be distributed over the State, according to a specified measure of apportionment; that the bills to circulate as currency, should have certain marks of uniformity, and be in a certain proportion to capital and specie on hand, and that a collateral security should be given for their redemption. The act contains measures for organization, relating to subscriptions for stock, the appointment of officers and boards of management; sections of a general interest, referring to the frauds of officers, the insolvency of the corporations, their misdirection and forfeiture; sections containing explicit and clear statements of corporate right and privilege, the capacities they can exercise, the functions they are to perform, and the term of their existence.

The act initiates a system of banking of which any five of its citizens may avail, and which provides for the confederacy of these associations under the general title of The State Bank of Ohio, and its branches, and their subjection to a board of control, appointed by them.

More than fifty banks have been formed under this act, and thirty-nine belong to the confederacy. Some of the banks, over whose charters the State has reserved a plenary control, are by the act permitted to join it. It is said "that the whole of this act is to be taken; the purpose of the act and the time of the act. It is a unit." It will not be contended that the fifty-first section of this act, by which this multitude of banking companies are adjudged to be corporations, with succession for twenty years, places every other relation established by the act, beyond the legislative domain for the same period of time. For there are in the act measures designed for organization and arrangement for the convenience and benefit of the corporators only; there are concessions creating hopes and expectations, out of which rights may grow by subsequent events; there are sections which convey present rights, or from which rights may possibly arise in the form of a contract; there are others which enter into the general system of administration, affect the public order, and tend to promote the common security. Some of these provisions may be dispensed with by those for whose exclusive benefit they were made. Some may be altered, modified, or repealed, to meet other conditions of the public interest, and some, perhaps, may not be alterable, except with the consent of the corporators themselves. To determine the class to which one enactment or another belongs, we are referred

to those general principles I have already considered. In this act, * of seventy-five sections, which organizes a vast [*415] machinery for private banking, which directs the delicate and complex arrangements for the supply of a paper currency to the State, and determines the investment of millions of capital, we find this sixtieth section. The act is enabling and permissive. It makes it lawful for persons to combine and to conduct business in a particular manner. It forms no partnership for the State, compels no one to embrace or to continue the application of industry and capital according to its scheme. It grants licenses under certain conditions and reservations, but is nowhere coercive. Among the general regulations is the one which directs the banks, at the end of every six months, to ascertain their net profits for the six months next preceding, and to set apart six per cent. for the State in the place of the other taxes or contributions to which they would be liable. But the legislature imposes no limit to its power, nor term to the exercise of its will, nor binds itself to adhere to this or any other rule of taxation.

The subject affects the public order and general administration. It is not properly a matter for bargain or barter; but the enactment is in the exercise of a sovereign power, comprehending within its scope every individual interest in the State. It is a power which every department of government knows that the community is interested in retaining unimpaired, and that every corporator understood its abandonment ought not to be presumed in a case in which the deliberate purpose to abandon it does not appear.

I have sought in vain in the sixtieth section of the act, in the act itself, and in the legislation and jurisprudence of Ohio, for the expression of such a deliberate purpose.

My opinion is, that the supreme court of Ohio has faithfully applied the lessons inculcated by this court, and that its judgment should be affirmed.

Order. This cause came on to be heard on the transcript of the record from the supreme court of Ohio, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court of Ohio in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said supreme court of Ohio for further proceedings, to be had therein in conformity to the opinion of this court.

16 H. 416; 18 H. 881, 880, 884; 19 H. 202, 898; 1 B. 486, 474; 2 B. 544; 1 Wal. 384; 4 Wal. 585.

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THE OHIO LIFE INSURANCE AND TRUST COMPANY, Plaintiffs in Error,
v. HENRY DEBOLT, Treasurer of Hamilton County, Defendant in
Error.

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The principles involved in the preceding decision further explained and applied to this case; but the legislation of Ohio, respecting the taxation of the plaintiffs, held not to amount to a contract, the obligation of which had been impaired.

Rules of construction of public grants, especially those made to corporations, in derogation of common right.

ERROR to the supreme court of Ohio. The case is stated in the opinion of the court.

Worthington and Stanberry, for the plaintiffs.

Spalding and Pugh, contra.

[* 427] *TANEY, C. J. In this case, the judgment of the supreme court of the State of Ohio is affirmed. But the majority of the court who give this judgment, do not altogether agree in the principles upon which it ought to be maintained. I proceed, therefore, to state my own opinion, in which I am authorized to say my brother Grier entirely concurs.

In 1851, the legislature of Ohio passed an act "to tax banks and bank and other stocks, the same as other property." The act makes it the duty of the president and cashier of every banking institution, having the right to issue bills or notes for circulation, annually to list and return to the assessor in the township or ward where the bank is located, the amount of capital and stock at its true value in money, together with the amount of surplus and contingent fund belonging to such institution, upon which the same amount of tax is to be levied and paid as upon the property of individuals. And by the third section of this act, the Ohio Life Insurance and Trust Company (the plaintiff in error) was brought within its provisions, and subjected to the payment of a like tax in all the several counties where its capital stock was loaned, according to the amount loaned and the average rate of taxation in each.

The payment of this tax was resisted by the plaintiff in error, upon the ground that the law imposing it impaired the obligation of certain contracts previously made between the State and the corporation.

On the other hand, it was insisted, on behalf of the State, that the right of taxation cannot be so aliened by mere statute as to prevent its resumption by the legislature whenever the public necessities require; and that the legislature was the judge of the public necessity in such cases.

And, further, if it should be held that the legislature of Ohio had the power to aliene its right of taxation, yet it had not exercised it in this instance; and when the tax in question was levied, there was no previous contract between the State and the corporation by which the State had relinquished the right to impose it.

The company having refused to pay the tax, upon the ground *above stated, the defendant in error, who is the [* 428] treasurer of Hamilton county, in which the corporation is located, instituted proceedings to enforce its collection. And upon final hearing of the parties, the supreme court of Ohio decided in favor of the State, and directed the tax to be paid, together with the penalty which the law inflicted for its detention. It is to revise this decree of the state court that the present writ of error is brought.

This brief statement will show that the questions which arise on this record, are very grave ones. They are the more important, because, from the multitude of corporations chartered in the different States, and the privileges and exemptions granted to them, questions of a like character are continually arising, and ultimately brought here for final decision. These controversies between a State and its own corporations necessarily embarrass the legislation of the State, and are injurious to the individuals who have an interest in the company. And as the principles upon which this case is decided, will, for the most part, equally apply to all of them, it is proper that they should be clearly and distinctly stated. I proceed to express my own opinion on the subject.

It will be admitted on all hands that, with the exception of the powers surrendered by the constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories. It follows that they may impose what taxes they think proper upon persons or things within their dominion, and may apportion them according to their discretion and judgment. They may, if they deem it advisable to do so, exempt certain descriptions of property from taxation, and lay the burden of supporting the government elsewhere. And they may do this in the ordinary forms of legislation or by contract, as may seem best to the people of the State. There is nothing in the constitution of the United States to forbid it, nor any authority given to this court to question the right of a State to bind itself by such contracts, whenever it may think proper to make them.

There are undoubtedly fixed and immutable principles of justice, sound policy, and public duty, which no State can disregard without serious injury to the community, and to the individual citizens who compose it. And contracts are sometimes incautiously made by

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States, as well as individuals; and franchises, immunities, and exemptions from public burdens improvidently granted. But whether such contracts should be made or not, is exclusively for the consideration of the State. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption [* 429] of the constitution of the * United States, and over which this court has no control. For it can never be maintained in any tribunal in this country, that the people of a State, in the exercise of the powers of sovereignty, can be restrained within narrower limits than those fixed by the constitution of the United States, upon the ground that they may make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest, is the foundation of our political institutions.

It is equally clear, upon the same principle, that the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the powers and rights of sovereignty which they themselves possess; or may restrict them within such limits as may be deemed best and safest for the public interest. They may confer on them the power to charter banks or other companies, and to exempt the property vested in them from taxation by the State for a limited time during the continuance of their charters, or accept a specified amount less than its fair share of the public burdens. This power may be indiscreetly and injudiciously exercised. Banks and other companies may be exempted, by contract, from their equal share of the taxes, under the belief that the corporation will prove to be a public benefit. Experience may prove that it is a public injury. Yet, if the contract was within the scope of the authority conferred by the constitution of the State, it is like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterwards, impair its obligation. When the contract is made, the constitution of the United States acts upon it, and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed.

This doctrine was recognized in the case of *Billings v. The Providence Bank*, 4 Pet. 514, and again in the case of *The Charles River Bridge Company*, 11 Pet. 420. In both of these cases the court, in the clearest terms, recognized the power of a state legislature to bind the State by contract; and the cases were decided against the corporations, because, according to the rule of construction in such cases, the privilege or exemption claimed had not been granted. But the power to make the contract was not questioned. And I am not

aware of any decision in this court calling into question any of the principles maintained in either of these two leading cases. On the contrary, they have since, in the case of *Gordon v. Appeal Tax Court*, 3 How. 133, been directly reaffirmed.

The question in that case was precisely the same with the present one; that is to say—whether the State had relinquished its right of taxation to a certain extent, in its charter to a [* 430] bank? The court held that it had, and reversed the judgment of the state court, which had decided to the contrary. And this opinion appears to have been unanimous—for no dissent is entered.

Again, in the case of *The Richmond Railroad Company v. The Louisa Railroad Company*, 13 How. 71, the question was, whether the State had not, by its charter to the former, contracted not to authorize a road like the latter, which would tend to diminish the number of passengers travelling upon the former between Richmond and Washington. The case, therefore, in principle was the same with that of *The Charles River Bridge v. The Warren Bridge*; and it was decided on the same ground: that is, that the contract, according to the rule of construction laid down in the *Charles River Bridge* case, did not extend to such a road as was authorized by the charter to the *Louisa Railroad Company*. But the opinion of the majority of the court is founded expressly upon the assumption that the legislature might bind the State by such a contract; and the three judges who dissented were of opinion not only that the legislature might bind it, but that it had bound it; and that the charter to the *Louisa Railroad Company* violated the contract and impaired its obligation. They adopted a rule of construction more favorable to the corporation than the one sanctioned in *The Charles River Bridge v. The Warren Bridge*.

It seemed proper on this occasion to remark more particularly upon this case, and the case of *Gordon v. The Appeal Tax Court*, because the last mentioned case was a restriction upon the taxing power of the State; and the other a restriction upon its power to authorize useful internal improvements—the two together illustrating and confirming the principles upon which *The Providence Bank v. Billings*, and *The Charles River Bridge* case, were decided.

There are other cases upon the same subject, but it is not necessary to extend this opinion by referring to them. It is sufficient to say, that they will all be found to maintain the same principles with the cases above mentioned, and that there is no one case in which this court has sanctioned a contrary doctrine.

I have dwelt upon this point more at length, because, while I con-

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cur in affirming the judgment of the supreme court of the State of Ohio, I desire that the grounds upon which I give that opinion should not be misunderstood; for I dissent most decidedly, as will appear by this opinion, from many of the doctrines contained in the opinions of some of my brethren, who concur with me in affirming this judgment. I speak of the opinions they have expressed in the case of *The Piqua Bank*, as well as in this.

[* 431] * The powers of sovereignty confided to the legislative body of a State are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected. They cannot, therefore, by contract, deprive a future legislature of the power of imposing any tax it may deem necessary for the public service—or of exercising any other act of sovereignty confided to the legislative body, unless the power to make such a contract is conferred upon them by the constitution of the State. And in every controversy on this subject, the question must depend on the constitution of the State, and the extent of the power thereby conferred on the legislative body.

This brings me to the question more immediately before the court: Did the constitution of Ohio authorize its legislature, by contract, to exempt this company from its equal share of the public burdens during the continuance of its charter? The supreme court of Ohio, in the case before us, has decided that it did not. But this charter was granted while the constitution of 1802 was in force; and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence. It appears, from the acts of the legislature, that the power was repeatedly exercised while that constitution was in force, and acquiesced in by the people of the State. It was directly and distinctly sanctioned by the supreme court of the State in the case of *The State v. The Commercial Bank of Cincinnati*, 7 Ohio, 125.

And when the constitution of a State, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive, and judicial, I think it must be regarded as the true one. It is true that this court always follows the decision of the state courts in the construction of their own constitution and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision,

ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest principles of justice, is bound to adopt the construction it received from the state authorities at the time the contract was made.

It was upon this ground that the court sustained contracts *made in good faith in the State of Mississippi, under [* 432] an existing construction of its constitution, although a subsequent and contrary construction, given by the courts of the State, would have made such contracts illegal and void. The point arose in the case of *Rowan and others v. Runnels*, 5 How. 134. And the court then said, that it would always feel itself bound to respect the decisions of the state courts, and, from time to time as they were made, would regard them as conclusive in all cases upon the construction of their own constitution and laws; but that it ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawful at the time they were made. It is true, the language of the court is confined to contracts with citizens of other States, because it was a case of that description which was then before it. But the principle applies with equal force to all contracts which come within its jurisdiction.

Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State, or decision of its courts, altering the construction of the law.

It remains to inquire whether the act of 1851 impaired the obligation of any existing contract or contracts with the plaintiff in error.

Before, however, I speak more particularly of the acts of the legislature of Ohio, which the company rely on as contracts, it is proper to state the principles upon which acts of that description are always expounded by this court.

It has been contended, on behalf of the defendant in error, (the

treasurer of the State,) that the construction given to these acts of assembly by the state courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this court always follows the construction given by the state courts to their own constitution and laws.

But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, [* 433] * although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the legislature, or of a covenant or agreement by one of its agents acting under the authority of the State.

It is very true that, if there was any controversy about the construction and meaning of the act of 1851, this court would adopt the construction given by the state court. And if that construction did not impair the obligation of the contract as interpreted by this court, there would be no ground for interfering with the judgment. For then the contract, as expounded here, would not be impaired by the state law. But if we were bound to follow not only the interpretation given to the law, but also to the instrument claimed to be a contract, and alleged to be violated, there would be nothing left for the judgment and decision of this court. There would be nothing open which a writ of error or appeal could bring here for consideration and judgment; and the duty imposed upon this court under this clause of the constitution would, in effect, be abandoned.

I proceed, therefore, to examine whether there is any contract in the acts of the legislature, relied on by the plaintiff in error, which deprives the State of the power of levying upon the stock and property of the company its equal share of the taxes deemed necessary for the support of the government.

The company was chartered by the legislature of Ohio on the 12th of February, 1834.

The purposes for which it was incorporated, and the character of the business it was authorized to transact, are defined in the second section. It confers upon the company the power, 1. To make insurance on lives. 2. To grant and purchase annuities. 3. To make

any other contracts involving the interest or use of money and the duration of life. 4. To receive money in trust, and to accumulate the same at such rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. 5. To accept and execute all such trusts of every description as may be committed to them by any person or persons whatsoever, or may be transferred to them by order of any court of record whatever. 6. To receive and hold lands under *grants with general or special [*434] covenants, so far as may be necessary for the transaction of their business, or where the same may be taken in payment of their debts, or purchased upon sales made under any law of the State, so far as the same may be necessary to protect the rights of said company, and the same again to sell, convey, and dispose of. 7. To buy and sell drafts and bills of exchange.

In addition to these powers, it was authorized by the 23d section of the charter to issue bills or notes until the year 1843,—subject to certain restrictions and limitations therein specified.

And the 25th section provides, that no higher taxes shall be levied on the capital stock or dividends of the company, than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State.

The last section of the charter reserved the right to the State to repeal, amend, or alter it after the year 1870.

These are the only provisions material to the question before us.

At the time this charter was granted, the act of March 31, 1831, was in force, which imposed a tax of five per cent. on the dividends declared by any banks, insurance, or bridge companies.

Subsequently, on the 14th of March, 1836, after this company was incorporated, another law was passed to prohibit the circulation of small bills; and by this law a tax of twenty per cent. was imposed upon dividends, with a proviso, “that should any bank, prior to the 4th of July next following, with the consent of its stockholders, by an instrument of writing under its corporate seal, addressed to the auditor of the State, surrender the right conferred by its charter to issue or circulate notes or bills of a less denomination than three dollars, after the 4th of July, 1836; and any notes or bills of a less denomination than five dollars, after the 4th of July, 1837; then the auditor of the State should be authorized to draw on such banks only for the amount of five per cent. upon its dividends declared after the surrender.

As the plaintiff in error had the usual banking power of issuing notes and bills for circulation until 1843, it justly considered itself within the provisions of this law, and filed the surrender required;

and ever since, until 1851, has paid the tax of five per cent., and no more, upon the dividends it declared. The act of 1836 was repealed in 1838, and permission again given to the banks to issue small notes and bills; but it does not appear that The Life Insurance and Trust Company ever availed itself of the privilege. Afterwards, in 1845, another law was passed, incorporating the State Bank [*435] of Ohio, and such banking companies *as might afterwards organize themselves under and according to the provisions of that act. And the 60th section of this law provided, that each banking company organized under that act should pay, semiannually, six per cent. on its profits, which should be in lieu of all taxes to which such companies, or the stockholders thereof, on account of stocks owned therein, would otherwise be subject.

Upon these acts of assembly, the plaintiff in error defends itself against the tax imposed by the act of 1851, upon two grounds: —

1. That by the act of 1836, the State agreed to relinquish the right to impose a higher tax than five per cent. upon the dividends declared by the corporation, during the continuance of its charter, upon the surrender of its right to issue small bills or notes.

2. That if this proposition is decided against it, yet, as the act of 1845 established a general banking system, by which the State agreed to receive from each bank organized under it, six per cent. upon its profits, in lieu of all taxes to which it would otherwise be subject, the State could not impose a higher tax upon this company under the contract contained in the 25th section of its charter hereinbefore mentioned.

The rule of construction, in cases of this kind, has been well settled by this court. The grant of privileges and exemptions to a corporation are strictly construed against the corporation, and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation nor any other power of sovereignty which the community have an interest in preserving, undiminished, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken. This is the rule laid down in the case of *Billings v. The Providence Bank*, and reaffirmed in the case of *The Charles River Bridge Company*.

Nor does the rule rest merely on the authority of adjudged cases. It is founded in principles of justice, and necessary for the safety and well-being of every State in the Union. For it is a matter of public history, which this court cannot refuse to notice, that almost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn origi-

nally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act.

*On the other hand, those who accept the charter have [*436] abundant time to examine and consider its provisions, before they invest their money. And if they mean to claim under it any peculiar privileges, or any exemption from the burden of taxation, it is their duty to see that the right or exemption they intend to claim is granted in clear and unambiguous language. The authority which this court is bound, under the constitution of the United States, to exercise, in cases of this kind, is one of its most delicate and important duties. And if individuals choose to accept a charter in which the words used are susceptible of different meanings,—or might have been considered by the representatives of the State as words of legislation only, and subject to future revision and repeal, and not as words of contract,—the parties who accept it have no just right to call upon this court to exercise its high power over a State upon doubtful or ambiguous words, nor upon any supposed equitable construction, or inferences made upon other provisions in the act of incorporation. If there are equitable considerations in their favor, the application should be made to the State, and not to this court. If they come here to claim an exemption from their equal share of the public burdens, or any peculiar exemption or privilege, they must show their title to it; and that title must be shown by plain and unequivocal language.

Applying this rule of construction to the laws hereinbefore referred to, it is evident that the first ground of defence cannot be maintained.

When the act of 1836 was passed, the State had an undoubted right, if it deemed proper, to impose the tax of twenty per cent. upon the incorporated companies therein mentioned, and to include the Life Insurance and Trust Company among them. Indeed, the right of the State in this respect is not disputed, and the argument on behalf of the plaintiff in error upon this point necessarily admits it. And we see nothing in the proviso which can fairly be construed as a contract on the part of the State, that it would not afterwards change the policy which that law was intended to carry into operation; nor any thing like a pledge that the State would not thereafter impose a tax of more than five per cent. upon the dividends of such banks as complied with the specified condition. The law is not a proposition addressed to the banks, but an ordinary act of legislation addressed

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to its own officer, and prescribing his duty in levying and collecting taxes from the corporations it mentions. It was the policy of the State, at that time, to infuse more gold and silver in the circulating currency, and to put an end to the circulation of small notes. The act of 1836 was manifestly intended to accomplish that object. And

the tax is accordingly so regulated as to make it the inter-
[*437] est *of the banks to abstain from issuing them. But the

insolvency of the Bank of the United States, and many of the state banks, and the general stoppage of specie payments, which happened soon afterwards, made it impossible to carry out the policy which the State deemed best for the public interests. The prohibition to issue small notes was therefore repealed in 1838, and the privilege of issuing them again restored to the banks. Now, without resorting to the established rule of construction, above stated, no fair interpretation of the words of these laws, can make them other than ordinary acts of legislation, which the State might modify or change according to the necessities of the public service. It would be straining the words beyond their just import and meaning to construe the reduced taxes levied, while the banks were prohibited from issuing small notes, as a perpetual contract not to levy more, although the privilege for which the reduction was intended, as an equitable compensation, should be restored. If it could be regarded as a contract, it evidently meant nothing more than that the tax should not be raised while the banks were prohibited from issuing small notes.

But the subject-matter of these laws shows that no contract could have been intended. Every contract of this kind presupposes that some consideration is given, or supposed to be given, by the corporation—that the community is to receive from it some public benefit, which it could not obtain without the aid of the company. But in this instance the consent or coöperation of this company was not necessary to enable the State to carry out the policy indicated by the act of 1836. It had indeed at that time the power to issue notes and bills for circulation. But the grant of this right to the corporation, in general terms, was not a surrender of the right of the State to prescribe by law, the lowest denomination for which notes or bills should be allowed to circulate. No such surrender is expressed, and none such therefore can be implied or presumed. For it is not only the right, but the duty of the State to secure to its citizens, as far as it is able, a safe and sound currency, and to prevent the circulation of small notes when they become depreciated, and are a public evil. And the community have as deep an interest in preserving this right undiminished, as they have in the taxing power. And like the taxing power it will not be construed to be relinquished, unless the intention

to do so is clearly expressed. The general power to issue notes and bills, without any express grant as to small notes, is subordinate to the power of the State to regulate the amount for which they may be issued.

Moreover, the power of the Life Insurance and Trust Company to issue notes or bills, of any description, terminated by the express provision in its charter in 1843. And if the acceptance of the condition contained in the proviso in the act of 1836 made that law a contract on the part of the State, the reduced tax was the consideration for the surrender of the privilege. It surrendered the privilege until 1843. It had nothing to surrender after that time. And of course there was nothing for which the State was to give an equivalent, or for which the company had even an equitable claim to require compensation. It would be a most unreasonable construction of such an agreement to say, that in consideration that the company would abstain from embarrassing the community with a small note circulation for seven years, the State contracted not only to exempt it from its equal share of taxation during the time it abstained, but also for twenty-seven years afterwards, during which period the corporation would be exercising every privilege originally conferred on it by its charter, and giving no equivalent for the exemption. Before such a conclusion can be arrived at, the rule hereinbefore stated must be reversed, and every intendment made in favor of the exclusive privileges of the corporation, and against the community; and that intendment, too, must be pushed beyond the fair and just construction of the language used, or the subject-matter and object of the agreement.

In every view of the subject, therefore, the defence taken under the act of 1836 cannot be maintained.

The second proposition of the plaintiff in error is equally untenable.

The contract with this company in relation to taxation is contained in the 25th section of the charter hereinbefore set forth. Its obvious meaning is, that the tax upon this company should be regulated by the taxes which the policy or the wants of the State might induce it to impose by its general laws upon banking institutions. And in the legislation of Ohio, the words "banking institutions," or "banks," appear always to be confined to corporations which were authorized to issue bills or notes for circulation as currency. This company, therefore, was to be subject to the taxes then levied, or which its policy or necessities might afterwards induce it to levy, on banking institutions. The tax is not to be regulated by any special contract that the State had made, or might afterwards make, with a particular bank or banks. Nor is there any pledge on the part of the State

that it will not afterwards enter into such contracts, and reserve in them a higher or lower rate of interest than that prescribed by its general laws. There is no provision in relation to such contracts contained in its charter. Its taxes are to be raised or lessened as the legislature may from time to time prescribe in cases of [* 439] banks where no special contract *intervenes to forbid it. This, in my opinion, is the true interpretation of the words used.

At the time the charter was granted, the act of March 12, 1831, was in force, which imposed a tax of five per cent. on the dividends of banks, insurance, and bridge companies. Of course, the plaintiffs in error were subject to that tax, and no more, while the law of 1831 continued in force; and it was not affected by any special contracts which the State had previously made. And it would have been liable to the tax of twenty per cent. imposed by the general act of 1836, if it had not complied with the condition in the proviso. But having complied, it remained, like other banking institutions which had no special contract, subject to the tax of five per cent.

Then came the act of 1845, which incorporated the State Bank, and authorized individuals to form banking companies in the manner and upon the terms therein specified. The 60th section provided that the banking companies organized under it should each pay, semiannually, six per cent. on its profits, which sum should be in lieu of all taxes to which the company or stockholders would otherwise be subject. It will be observed that this provision does not extend to all the banks in the State, but is, in express terms, confined to those which should be organized under that act of assembly; that is to say, to such banks only as should be organized in the manner authorized by that law, and become liable to all the restrictions, provisions, and duties prescribed in it.

The court has already decided at the present term that the State has, by this section, relinquished the right to impose a higher tax than the one therein mentioned, upon any bank organized under that law. But that decision does not affect this case. For this company was not organized under the act of 1845, and is not therefore embraced by the 60th section. It remained under the regulation of the general law, and was still subject to a tax of five per cent. on its dividends, and nothing more. It was not liable to the increased tax of six per cent. upon profits levied upon these banks. For that tax was the result of a special agreement, and not of the repeal of former laws. And so it appears to have been understood and construed by the parties interested. The plaintiff in error continued to pay five per cent. on its dividends; while the banks organized under the act

of 1845, paid the increased tax of six per cent. on their profits. Neither was the duration of its charter shortened. It still was to continue until 1870, while the corporate existence of these banks was to terminate in 1866. Nor was it subject to the restrictions, limitations, or duties imposed upon them, when they differed from those of its own charter.

* This being the case, there is no reason why the tax to [* 440] be paid by the plaintiff in error should not be regulated by the general rule prescribed by the act of 1851. It was regulated by the general act of 1836, until this law was passed. Its tax was then lower than that levied on the banking companies organized under the act of 1845. And, as the special contract on which these banks were chartered did not apply to this corporation before the act of 1851, we do not see upon what ground it can be applied afterwards. As the tax levied on the Life Insurance and Trust Company was regulated by the general rule before, it would seem to follow that it should continue to be so regulated, as there is nothing in that law to alter its original charter. The increased amount of the tax can make no difference.

It is said, however, that when the act of 1851 was passed, there was no solvent bank in the State except those brought into existence by the act of 1845; that those previously established had all failed, and consequently there was no banking institution upon which the increased tax could operate. There is some difference, as to this fact, between the counsel. But I do not deem it material to institute a particular inquiry upon the subject. The provisions of the act of 1851 are general, and expressly apply to all banks then in existence, if any, or which have since been established, unless they were exempted from its operation by contract with the State. And it is by this general rule or policy that this company is bound by its charter to abide.

Besides, it has been stated in the argument, and seems to have been admitted, that in 1845 there was no banking institution in the State upon which a tax was levied. They had all, it is said, stopped payment and made no dividends, and consequently no tax was paid. And this fact was strongly urged in the case of *The Piqua Branch of the State Bank of Ohio* against Jacob Knoop, treasurer, 16 How. 369, in order to support the construction of the contract which has been sanctioned by the court. Yet the fact that there was no bank then in existence paying the tax, did not withdraw the Life Insurance and Trust Company from the operation of the general law, nor subject it to the increased taxation of the act of 1845.

Again it is said, that forty or fifty banks were organized under the act of 1845, and that that act formed the general banking system of the State; and the rule of taxation then prescribed ought, therefore, to be applied to this corporation, under the terms of its charter. But, as I have already said, the charter to the Life Insurance and Trust

Company does not prohibit the State from granting charters, [* 441] under any special limitation as to *taxation, which it may deem advisable and for the public interest. And if it may grant one, it may grant as many as it may suppose the public interest requires, upon the same or upon different conditions from each other. The State has not contracted that this company shall have the benefit of all or any of such agreements, or shall pay only the lowest tax levied on a bank, or the tax levied on the greater number of them. It has agreed that it shall have the benefit of its general regulations and laws in this respect, but not of its special contracts. And when the owners of property, vested in the stocks of a corporation, come here to claim a privilege or franchise, which exempts them from their equal share of the public burdens borne by the rest of the community, they are entitled to receive what is expressly or plainly granted to them, and nothing more.

Upon the whole, I am of opinion that the act of 1851 does not impair the obligation of any contract with the plaintiff in error, and the judgment of the supreme court of Ohio ought, therefore, to be affirmed.

CATRON, J. I stated my views as to the character and effect of the sixtieth section of the act of 1845, in the case of *The Piqua Bank v. Knoop*; there I came to the conclusion that no restraint was intended to be imposed on a future legislature to impose different and additional taxes on the banks to which the act applies, if that was deemed necessary for the public welfare.

2. My conclusion also was, in the above case, that if such restraint had been attempted, it was inoperative for want of authority in a legislature to vest in a corporation by contract, to be held as a franchise and as corporate property, a general political power of legislation, so that it could not be resumed and exercised by each future legislature. That a different doctrine would tend to sap and eventually might destroy the state constitutions and governments; as every grant of the kind, to corporations or individuals, would expunge so much of the legislative power from the state constitution as the contract embraced; and if the same process was applied to objects of taxation, first one and then another might be exempted, until all were covered, and subject to the same immunity, when the government must cease to exist for want of revenue.

3. That the constitution of Ohio, of 1802, forbid such tying up of the hands of future legislatures acting under its authority, it being so construed by her own courts, whose decisions we were bound to follow. Nor has any law or decision of a court in Ohio construed its late constitution of 1802 in this regard, until the decisions, lately made on the tax laws here in controversy, settled its true meaning.

* These principles will equally apply in this case as they [* 442] did in that of *The Piqua Bank v. Knoop*; even admitting that the sixtieth section of the act of 1845 is in effect and fact a general provision applicable to the existing banks of Ohio, and embraces the Insurance and Trust Company.

It is proper that I should say, my object here is not to express an opinion in this case further than to guard myself against being committed in any degree to the doctrine that the sovereign political power is the subject-matter of a private contract that cannot be impaired or altered by a subsequent legislature; that such act of incorporation is superior to subsequent state laws affecting the corporators injuriously; and that the corporation holds its granted franchises under the constitution of the United States, in effect, and holds and maintains the portion of sovereign power vested in it by force of the authority of this court; thus standing off from and above the local state authorities, political and judicial, and setting them at defiance, as has been most signally done in one instance, brought to our consideration from Ohio at this term, in the case of *Deshler v. Dodge*, 16 How. 622. There the tax collector distrained nearly forty thousand dollars' worth of property from four of these banks claiming exemption. On the same day, an assignment was made by the four banks of the property in the collector's hands to *Deshler*, a citizen of New York. He sued out a writ of replevin in the circuit court of the United States, founded on these assignments. The marshal of that court, by its process, retook the property from the tax collector's hands, and delivered it to the non-resident assignee, as the legal and true owner, who now holds it.

No other or further step is required to secure our protection to corporations setting up claims to exemption from state laws. I have become entirely convinced that the protection of state legislation and independence, supposed to be found in a liberal construction of state laws in favor of the public and against monopolies, as asserted in the *Charles River Bridge* case, is illusory and nearly useless, as almost any beneficial privilege, property, or exemption, claimed by corporations or individuals in virtue of state laws, may be construed into a contract, presenting itself as unambiguous and manifestly plain to one

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mind, whereas to another it may seem obscure, and not amounting to a contract. No better example can be found than is here furnished.

When I take into consideration this fact, and, in connection with it, the unparalleled increase of corporations throughout the Union within the last few years; the ease with which charters, containing exclusive privileges and exemptions are obtained; the vast amount of property, power, and exclusive benefits, prejudicial to [*443] other classes of society that are vested in and held * by these numerous bodies of associated wealth, I cannot but feel the grave importance of being called on to sanction the conclusion that they hold their rights of franchise and property under the constitution of the United States, and practically under this court, and stand above the state government creating them.

My opinion is, that the judgment of the state court should be affirmed for the reasons here suggested, and stated by me at large in the case of *The Piqua Bank v. Knoop*.

DANIEL, J. In the conclusion adopted by the opinion of the court, that the judgment of the supreme court of Ohio should be affirmed, I entirely concur; but from the reasoning by which the court has reached its conclusion, I am constrained to dissent. I never can believe in that, to my mind suicidal doctrine, which confers upon one legislature, the creatures and limited agents of the sovereign people, the power, by a breach of duty and by transcending the commission with which they are clothed, to bind forever and irrevocably their creator, for whose benefit and by whose authority alone they are delegated to act, to consequences however mischievous or destructive. The argument of the court in this case leading, in my apprehension, to the justification of abuses like those just referred to, I must repudiate that argument, whilst I concur in the conclusion that the decision of the supreme court of the State of Ohio should be affirmed, both for the reasons assigned in support of their judgment by that court, and for the further reason that this court cannot rightfully take cognizance of the parties to this controversy.

CAMPBELL, J. My opinion is, that the act of the general assembly of Ohio, entitled: "An act to tax banks, and bank and other stocks, the same as other property is now taxable by the laws of this State, of March, 1851," does not impair the obligation of any contract contained in the act of incorporation of the plaintiff, or in any other act of the general assembly of the State with which the plaintiff is concerned.

I concur in the opinion of the chief justice concerning the interpretation of the statutes of Ohio involved in this case, and the doctrines of interpretation applicable to these and statutes of a similar description, and in the conclusions to which they conduct.

In the decision of the cases which have been brought to this court from the supreme court of Ohio, I have not found it necessary to declare an opinion upon the powers of the general *assem- [*444] bly to modify or to repeal an act of incorporation like the one held by these banking institutions; nor of the limitations upon the general assembly in administering the power of taxation — much less to consider the powers of the people of Ohio, to reform all the proceedings and acts of their government, or whether those powers of the people can be controlled in their exercise by any jurisdiction or authority lodged in this court.

The questions pressing upon us involve interests of such a magnitude, and consequences so important, that I feel constrained to stop at the precise limit at which I find myself unable to decide the case at law or equity before me — that being the limit of my constitutional power and duty.

I file this opinion merely to say, that I do not concur in the opinion which has been delivered on the points wherein any of these questions are directly or indirectly considered.

M'LEAN, J. The language of the 25th section of the charter of the Ohio Life Insurance and Trust Company, is: "No higher taxes shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in this State."

This charter was passed the 12th of February, 1834. It was accepted by the company, a large amount of stock was subscribed and paid, and the bank was organized and went into operation.

The 2d section gave power to the company, 1. To make insurances on lives. 2. To grant and purchase annuities. 3. To make any other contracts involving the interest or use of money, and the duration of life. 4. To receive money in trust, and to accumulate the same at such a rate of interest as may be obtained or agreed on, or to allow such interest thereon as may be agreed on. 5. To accept and execute all such trusts of every description, as may be committed to them by any person or persons whatsoever, or may be transferred to them by order of any court of record whatever. 6. To receive and hold lands under grants, with general or special covenants, so far as the same may be necessary for the transaction of their business, or where the same may be taken in payment of their debts, or purchased upon

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sales made under any law of this State, so far as the same may be necessary to protect the rights of the said company, and the same again to sell, convey, and dispose of. 7. To buy and sell drafts and bills of exchange.

The capital stock of the corporation was fixed at two millions of dollars, the whole of which was required to be invested in bonds or notes drawing interest, not exceeding seven per cent. [* 445] * per annum, secured by unincumbered real estate within the State of Ohio, of at least double the value in each case of the sum so secured.

By the 23d section, it is declared that "the company shall have power, until the year 1843, to issue bills or notes to an amount not exceeding twice the amount of the funds deposited with said company, for a time not less than one year, other than capital; but shall not, at any time, have in circulation an amount greater than one half the capital actually paid in and invested in bonds or notes secured by an unincumbered real estate, agreeably to the 7th section of this act, nor a greater amount than twice the amount of deposits, &c.

The section under which the claim to a limited taxation is maintained, is only made certain by reference to the taxes levied on the capital stock or dividends of other incorporated banking institutions. And more satisfactorily to arrive at this result, it may be proper to see what construction has been given to the section by the officers of State, whose duty it was to assess the tax and collect it.

The act of the 12th of March, 1831, imposed a tax on banks of five per cent. upon the amount of their dividends. This tax was paid by the trust company until the act of the 14th of March, 1836, called the act to prohibit the circulation of small bills. Under this act, the auditor was authorized to draw in favor of the treasurer of state for twenty per cent. on the dividends of the banks, provided, if they should agree in the form required to relinquish the right under their charters to issue five dollar bills, and three dollars, the auditor should draw only for five per cent.

The trust company acceded to the proposal, and filed the necessary papers, relinquishing the right to issue the small bills as required. But this made no difference in the amount of the tax paid by the bank.

The tax continued the same rate of five per cent. on the dividends of banks until the act of 1845 was passed, containing the following compact: "Each banking company, organized under this act, or accepting thereof, and complying with its provisions, shall semi-annually, on the days designated in the fifty-ninth section, set off to

the State six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding; which sum or amount, so set off, shall be in lieu of all taxes to which such company, or the stockholders thereof, on account of stock owned therein, would otherwise be subject," &c.

As the power of the State to exempt property from taxation, under a compact which binds it, has been discussed somewhat
* at large in the case of *The Piqua Branch Bank v. Knoop*, [* 446] at this term, nothing further need now be said on the subjects there examined; but the point, whether there is a contract which should exempt the trust company bank from general taxation, must be considered. There are two grounds under which this bank claims an exemption.

1. Under its original charter.

2. Under the small note act of 1836. The second I shall not consider.

The twenty-fifth section in the charter guarantees, that "no higher taxes shall be levied on the trust company than on the capital or dividends of incorporated banking institutions in the State." Now, to make this provision specific as to the amount of the tax, the other banking institutions of the State to which the section refers, must be ascertained.

Some doubt may arise whether the institutions referred to were such as were existing at the time the charter was granted, or to banks subsequently taxed. As the words in the section, in relation to taxation of the bank, are, "than are or may be levied," it would seem to embrace the future law of taxation, as well as the one in force at the date of the charter. Taking this as the true construction, the tax of five per cent. on the dividends was properly assessed under the act of 1831 and 1836.

At the time the charter of this company went into operation, some of the banks were taxed four per cent. on their dividends; but as the greater number were taxed five per cent. on their dividends, the auditor of state drew for five. This seemed to be a reasonable construction of the twenty-fifth section, as it refers to a general rule of taxation, and not to a particular one. The tax shall not be higher than that on the incorporated banks of the State.

After the act of 1845, the trust company was chargeable with six per cent. on the dividends, deducting expenses and ascertained losses, on the ground that a very large proportion of the banks of the State were so taxed; and that would seem to come within the intention of the trust company charter. Without doing violence to the language of the twenty-fifth section, it cannot be said to embrace the

highest rate of taxation nor the lowest ; that rate which would include the greater number of banks, would seem to be just. And that was the construction given by the auditor before the tax law of 1851.

The act of the 12th of March, 1851, imposed a much higher tax on banks, by assessing it on all the property of the banks, instead of the six per cent. on the dividends. This embraced the banks chartered under the act of 1845, as well as all others. And if this law had been held to be constitutional, it would, undoubtedly, apply to the trust company.

[* 447] * On the 21st of March, 1851, the same day the above tax law was passed, an act to authorize free banking was enacted, which continued in force until it was repealed by the adoption of the constitution. Under this law it is ascertained, from the report of the auditor, that thirteen banks, or about that number, were organized. There were about fifty banks organized under the act of 1845. Four of the old banks were not included in this organization. Now, all the banks organized under the act of 1845, as we have held in the Piqua Branch Bank case, were not subject to a higher tax than six per cent. on their dividends.

At the time the tax law of 1851 was made to operate on the trust company, there does not appear to have been a bank in the State on which such tax could be assessed. There were, it is believed from the report of the auditor of state, thirteen banks organized under the bank act of 1851, passed on the same day as the tax act ; but not one of those banks was in operation until some time after the tax took effect on the trust company. This bank act was repealed by the new constitution, so as to arrest the further organization of banks under it. Now, from these facts the question arises, whether the twenty-fifth section shall be held to apply to the fifty banks in operation under the act of 1845, or to the thirteen banks which were afterwards organized under the act of 1851. It is true that the act of 1851, imposing the tax, was intended to affect all the banks, and especially the trust company ; but that act being held to be unconstitutional, cannot be considered as governing the twenty-fifth section of the trust company charter. The provision in that section, that "no higher duties shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in the State," must refer to a legal taxation ; and if this be the correct interpretation, then, at the time this tax law was passed, there was not a bank in the State on which the tax could take effect. The twenty-fifth section referred to incorporated institutions, and not to contemplated incorporated banks. Such a construction must be given to the section if it have any effect.

This reference, embracing the taxation under the act of 1845, gives to the trust company charter the same effect as if the sixtieth section of the act of 1845 had been embodied in it. By reference, it constitutes a part of the trust company charter, and it would seem to me that nothing short of this gives to the twenty-fifth section the effect it was intended to have.

That section has been relied on by the bank as a pledge or compact, not complete within itself as to the amount of the tax; but by reference to existing incorporated banks, embracing the tax *imposed upon them as the tax intended to be applied to [* 448] the trust company.

In this view this section is made certain, and contains all the requisites of a contract. The same certainty would make good a grant for land. And this is sufficient. The restriction of the power of the legislature of Maryland, in regard to taxing the banks of that State, was made out by construction as clearly and as satisfactorily as if it had been expressed in words.

Would any one contend that the legislature of Ohio could tax the trust company under its charter, without any reference to existing incorporated banks? This was done by the tax law of 1851. But the legislature may have supposed that law would operate upon all banks in the State. As that law cannot so operate, this tax on the trust company, then, should be considered as taxing the trust company without reference to any existing banks, but to those which might or might not be organized under the act of 1851. This, it seems to me, is in violation of all sound rules of construing the twenty-fifth section.

The supreme court of the State considered this charter of the trust company as resting on the same footing as the other banks. In the discussion of the subject, the sixtieth section of the act of 1845 was examined. They rightly considered that section as applying, by reference, to that company; and, in this respect, I entirely agree with them. I think the trust company stands upon the same basis, and should have the same judgment applied to it, as was applied to the banks under the act of 1845.

In the argument of the counsel against the trust company bank, it was insisted that the rule which is to determine the amount of taxation, is found in the banking companies under the act of 1851, and not under the act of 1845. And this is founded chiefly on the fact that the act of 1851 was a general law, and imposed a tax upon all the banks of Ohio. This argument would be unanswerable, if the existing banks were subject to the tax law of 1851. But, under our decision, that law has no operation on the existing banks; and this

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fact was not considered by the counsel. The decision in *The Piqua Bank* case has taken this ground from the counsel. For they did not, in any part of their argument, contend that the tax could apply to the trust company as "incorporated banks," when no such banks were incorporated. This would seem to be in violation, not only of the words of the twenty-fifth section, but of the clear import of that section.

Neither the supreme court of the State nor the counsel relied upon such an argument. The court of the State and the counsel in the trust company case, discussed the sixtieth section of the act [* 449] * of 1845, as, by reference, constituting a part of its charter. And this is the true question in the case.

The privilege of issuing bills of circulation, which terminated in 1843, can have no effect upon the question of taxation. That company still exercised, under its charter, its banking powers as a bank of deposit, and did a much larger business than any bank of the State. After 1843, as before that period, its dividends were taxed as the other banks. It was in fact a bank, and discounted, and was the principal bank in the State. These facts appear from the taxes paid to the auditor, which constitute a part of the record.

In the argument, it is assumed that this bank is taxed at the rate only at which individuals are taxed. From the facts before us, I think there is a mistake in this statement.

The capital of this bank is stated in the charter to be two millions of dollars. From the record, it appears that eight per cent. is the average dividend declared. This would give one hundred and sixty thousand dollars, as dividend, per annum. From the report of the auditor of Ohio, I observe the taxes charged against the trust company, including the penalties incurred for that year, amounts to the sum of \$108,477.85. This sum, deducted from the dividends for the year, will leave only the sum of \$51,523 to be distributed among the stockholders. This would give to them little more than two and a half per cent. on their capital. But if the bank had paid the tax, without incurring any penalty, it would have amounted to a sum not much below seventy thousand dollars. This would take nearly one half of the profits of the year. This result must convince any one that there must be some error in the statement that this bank is taxed no more than property is taxed in the hands of individuals. No free people would pay nearly one half the profit of a large concern, in taxes. But I think this result may be accounted for.

The capital of this bank is loaned at seven per cent., and distributed among the counties of the State. Funds are received on deposits for which four per cent. per annum, or a higher rate of interest is

paid. The bank having the general confidence of business men, its deposits are large, the notes payable to the bank, bills of exchange, &c., are all assessed at their face, as capital, and also, it is supposed, all moneys on deposit. From these, no deduction is made on account of debts due to depositors or to other persons, as the law requires, in assessing the personal property of an individual. No trust company, organized as this company is organized, can do business under such a pressure of taxation.

This bank was organized when the currency of Ohio was * deranged, and embarrassments were general throughout [*450] the country. The general bankrupt act followed, after the lapse of some years. The agency of the Trust Company Bank, in distributing its capital in every county in the State, as required by its charter, conduced to correct the evils of a vitiated currency in the State; and, in that respect, has continued to exercise a salutary influence over its circulation. These considerations, I am aware, have nothing to do with the constitutional question in the case, and I only advert to them in answer to the argument that this bank has no ground of complaint, as it is taxed on its property as if the property were in the hands of an individual.

Wayne, J., dissented from the judgment of the court.

CURTIS, J. I dissent from the judgment of the majority of the court in this case. I consider the twenty-fifth section of the charter of the company to be a contract by the State with the corporation, that the rate of taxation of this company shall not at any time be higher than the rate of taxation actually and legitimately imposed on banking institutions; that this contract is not complied with by passing an act to tax banks, which could not, and did not operate, in point of fact, to tax the banking institutions of the State; that what was bargained for and granted was not conformity to an inoperative general law, but conformity to the actual and legal rate of taxation of banks for the time being; and consequently, as, when the tax in question was levied, the banking institutions existing in the State were not subject to the law under which the Life and Trust Company was taxed, and were not liable to pay the rate of taxation imposed on that company, the obligation of the contract of the State to impose on the Life and Trust Company no higher taxes than are or may be imposed on banking institutions, has been impaired; because when this tax was imposed it was a higher tax than was or could be legitimately imposed on the then existing banking institutions of the State. I do not go into an extended examination of this subject,

because it involves only a construction of this particular contract, and though important to the parties, is not of general interest. Upon the other questions involved in the case, namely, as to the power of the legislature of Ohio to make a contract fixing the rate of taxation of certain property for a term of years,—as to the duty of this court to expound the contract whose obligation is alleged to be impaired, and the propriety of accepting the construction of the constitution of the State which had been practised on by all the branches of its government, and acquiesced in by the people for many years, when the contract in question was made, I fully concur in the views of the chief justice, as expressed in his opinion.

Nelson, J. concurs with Curtis, J.

1 B. 358; 1 Wal. 175.

LOUIS D. GAMACHE, SAMUEL and LEONORE GAMACHE, by Guardian, WILSON PRIMM, LOUIS PRIMM, JOHN CAVENDEN, and ABBY P. TRUE, Plaintiffs in Error, v. FRANCOIS X. PIQUIGNOT, and the Inhabitants of the Town of Carondelet.

16 H. 451.

Under the acts of 1812, (2 Stats. at Large, 748,) and 1824, (4 Stats. at Large, 65,) concerning town and village lots in Missouri, it was not competent for the recorder to give a certificate of confirmation in 1839, and thereby divest a title already acquired under the United States.

THE case is sufficiently stated in the opinion of the court.

Holmes, for the plaintiffs.

Picot, contra.

[*464] * CATRON, J., delivered the opinion of the court.

This case was brought here by writ of error to the supreme court of Missouri, and presents questions alleged to be cognizable in this court under the 25th section of the judiciary act.¹ The plaintiffs claimed a tract of land of six arpens in front, and forty back, lying adjoining to the village of Carondelet, in Missouri. It was claimed as "an out lot" which had been confirmed by the act of congress of June 13, 1812, to John B. Gamache, the ancestor of the plaintiffs.

In support of this position there was offered, in evidence, certain documents issued from the office of the recorder of land titles. The

¹ 1 Stats. at Large, 85.

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first was a paper claimed to be a certificate of confirmation issued by Conway, the recorder of land titles, dated 22d January, 1839, under the act of congress of the 26th May, 1824. The second was an extract from the registry kept by the recorder of certificates, issued by him under the act of 1824, by which it appears that Conway entered the certificate of Gamache's representatives on that register on the 12th March, 1839, and furnished on that day to the surveyor-general a description of the land. The third was an extract from the additional list of claims furnished by the recorder to the surveyor-general on the 12th March, 1839, which addition was of the Gamache claim alone. There were other documents showing that Hunt, who was the recorder of land titles, who acted under the act of 1824 in taking proof of claims, and who filed with the surveyor the list of claims proved before him, had filed one or two supplemental or explanatory lists after the first.

The court below rejected the evidence offered.

A survey of the claim of Gamache was made by a deputy surveyor under instructions from the surveyor-general; and the survey being returned to the office by the deputy, and a plat made, the word "approved" was written upon it and signed by the then surveyor-general, but it never was recorded. It appeared in evidence that the practice of the surveyor's office, *when a [* 465] deputy surveyor made return of a survey which he had been instructed to make, was, to have the survey examined, to see the manner in which the deputy had followed the instructions given, and if he had followed them, his work was approved, and the approval evidenced by such writing as had been made in this case, which was intended to authorize the payment of the deputy for his work; and that subsequently the survey was more carefully examined, and if found to be a proper survey in all respects, it was recorded in the books of the office, which was the evidence that it was finally adopted and approved, and that by the practice of the office certified copies of surveys were not given out until they were thus finally approved and recorded. Conway, who had been surveyor-general as well as recorder, testified that he would regard the survey of the Gamache claim as an approved survey, and would record it as such if he were in the office.

It appeared in evidence that the present surveyor-general refused to record it as an approved survey, or to certify it to the recorder as a survey of land for which a certificate of confirmation is to issue, and that in that refusal he is sustained by the department at Washington.

After the evidence was closed, the court, by an instruction, de-

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clared that the survey was not evidence of title, nor of the boundaries and extent of Gamache's claim.

A certified copy of the affidavits made before recorder Hunt, when he was taking proof under the act of 1824, was in evidence; but an instruction given to the jury substantially excluded them from consideration.

On this state of facts, the supreme court of Missouri held, among other things, as follows:—

“In the present case we have a recorder of land titles, fourteen years from the passage of this act, attempting to give the evidence of title, by issuing a certificate of confirmation, and certifying the claim to the surveyor-general as one confirmed by the act of 1812. If the government of the United States has confirmed the title set up by the plaintiffs by that act of congress, then the party, as has been held in this court, does not lose his land by the failure to procure the evidence provided for by the act of 1824; and under these decisions the plaintiffs in this case, after the evidence was rejected, which they claimed was rightly issued under the last-mentioned act, proceeded to prove the cultivation and possession of their ancestor, Gamache, and claimed that the title was confirmed by the act of 1812.”

“If the evidence of title, purporting to be issued under the act of 1824, appeared undisputed by the United States, and acknowledged and treated by the government as effectual, then it may be
- *466] * that a person who was a mere stranger to the title would not be allowed to dispute the correctness of the conduct of the officers in their attempt to carry out the law. But when we find that the government itself, in its own officers, arrests the progress of the title, and the whole reliance of the party in this case is upon the acts of the recorder, the correctness of which is denied by the government, we will examine his acts and give them effect only so far as they conform to the law.”

“That the recorder, under the act of 1824, was required to act in a quasi judicial character, is perfectly manifest, although there was no mode provided by the law for the expression of an opinion against the sufficiency of the evidence given before him. If a claim was, in his judgment, confirmed by the act of 1812, he issued to the party a certificate of confirmation, and included the lot in the descriptive list which he was required to furnish the surveyor-general. If there was a failure to prove the inhabitation, cultivation, or possession to his satisfaction, he simply omitted to include the claim in his list, and he issued no certificate.”

“The acts required to be done when a claim was confirmed, were

to be done immediately after the expiration of the time limited for taking the proof; and when we see, from the evidence offered by the plaintiff, that the recorder filed his list of confirmations with the surveyor in October, 1827, near twelve years before Conway, his successor, returned the present claim to that office, we cannot avoid the conclusion that this latter act was not within the scope allowed for such proceeding by the act of congress. It is not necessary to maintain that if Hunt, the recorder who took the proof, had died before he acted upon the claims, his successor could not act upon them; but when he did act, and made out and furnished to the surveyor the list required by law, the conclusion is one which the law draws, that claims not within that list, are claims not proved to his satisfaction."

The claim of Gamache was anxiously prosecuted before the department of public lands at Washington, during the pendency of this suit, and was there decided by the commissioner in conformity to the decision of the supreme court of Missouri; and which decision was confirmed by the secretary of the interior in September last. The reasons for this decision are here given in the language of the commissioner, in reply to the plaintiffs' counsel prosecuting the claim.

"The surveyor-general at St. Louis having declined to approve the survey as made by Brown for Gamache, and to certify the same to the recorder — You apply to this office to give orders to surveyor-general Clark, 'requiring him to return the survey of the
* tract of six by forty arpens in the name of John B. Ga- [* 467]
mache, Sr., or his legal representatives, to the recorder of land titles, and that the recorder be directed to issue to "you" a certificate of confirmation in the usual form, that "you" may have the evidence of your title in the usual form for the purpose of prosecuting your rights in the courts having competent jurisdiction."

"In behalf of the representatives of Gamache, it is maintained that they are confirmed by the act of 13th June, 1812.

"The first section of the supplemental act of 26th of May, 1824, made it the duty of the individual owners or claimants whose lots were confirmed by the act of 1812, on the ground of inhabitation, cultivation, or possession prior to the 20th of December, 1803, 'to proceed within eighteen months after the passage of the act of 1824,' to designate their said lots by proving before the recorder of land titles for said State and territory the fact of such inhabitation, cultivation, or possession, and the boundaries and extent of each claim, so as to enable the surveyor-general to distinguish the private from the vacant lots appertaining to the said towns and villages."

"The 3d section of the said act of 1824, made it the duty of the

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recorder to issue a certificate of confirmation for each claim confirmed, but further declares as follows:—

“And so soon as the said term shall have expired, he shall furnish the surveyor-general with a list of the lots so proved to have been inhabited, cultivated, or possessed, to serve as his guide in distinguishing them from the vacant lots to be set apart as above described, and shall transmit a copy of such list to the commissioner of the general land-office.”

“A report or list, purporting to contain all the claims proved up under the said act of 1824, was accordingly returned to this office in 1827, but that list does not embrace this particular claim of Gamache for 6 × 40 arpens within the limits of the Carondelet Commons.”

We have no power to look behind that list in order to determine what has or has not been confirmed, any more than we could look behind the face of a report of a board of commissioners or of the recorder, which had been confirmed by a law of congress, and take cognizance of a case not embraced by such report, even if satisfied that it had been omitted by the reporting officer through inadvertence. This is a well-settled principle. See instructions to register and receiver, 13th April, 1835. 2d part Birchard's Comp. printed laws, instructions, and opinions, page 757, &c.

“As the 3d section of the act of 26th May, 1824, then expressly declares that the list to be furnished by the recorder ‘shall [* 468] * serve as a guide’ to the surveyor-general in the execution of the duties devolved on him by the act, and as it is not shown that the claim in question is embraced by that list, neither that officer, nor this office, has the power to treat the claim in question as confirmed and entitled to an approved survey, and, consequently, in my opinion, the commissioner has not the legal ability to comply with your application in the premises.”

With the correctness of these decisions of the supreme court of Missouri and the department of public lands, we entirely concur. Nor will we add any views of our own in support of the state decision, for the reason that the questions here presented are peculiarly local, being limited to the city of St. Louis and a few villages in the State of Missouri, the public at large having no concern with any question presented in this cause. And after due consideration, we here take occasion to say, that although it is in the power of this court, and made its duty, to review all cases coming here from state courts of last resort, in which was drawn in question and construed prejudicial to a party's claim, the constitution, or a law of the United States, or an authority exercised under them, still, in this peculiarly

local class of cases asserting titles to town and village lots confirmed by the act of 1812, we feel exceedingly indisposed to disturb the state decisions. So far the ability and soundness they manifest have commanded our entire concurrence and respect, and are likely to do so in future. It is proper further to remark that the jury was instructed, at the request of the plaintiffs, that inhabitation and cultivation of a part of the lot, claiming the whole, would be good for the whole within the meaning of the act of 1812.

The jury was also instructed, at the defendant's request, "that if the land spoken of by the witnesses as actually cultivated and possessed by Gamache, did not embrace the land now in dispute, they ought to find for the defendants."

In regard to these instructions, the state court held that:—

"The first instruction given for the defendant, if it stood alone, would be so entirely erroneous as to require a reversal of the judgment. That the jury should be required to find for the defendant, if the cultivation by the elder Gamache was not a cultivation of the precise piece of ground in controversy, would have been so gross a mistake, that neither the court nor the counsel asking the instruction could be supposed to have fallen into it. Accordingly, when we examine the second instruction given for the plaintiff, we find the court telling the jury that the cultivation of a part of a tract, under claim of the whole, was, under the act of 1812, a cultivation of the whole tract; * and, in looking into the case, we see that [* 469] the controversy was whether this cultivation of Gamache was not on an entirely different tract from that now claimed to include the premises in dispute. "We are satisfied that the jury must have understood the question to be, whether the cultivation of Gamache, spoken of by the witnesses, was at any place upon the tract to which his heirs now claim title, or at some place upon an entirely different tract. In this view of the question submitted to the jury, there would be no propriety in reversing the judgment for the instruction given for the defendant."

The instructions asked by the plaintiffs, which were refused by the court, all refer to the proceedings in the recorder's office, the effect of which has been considered. On the whole, it is ordered that the judgment be affirmed.

THE STEAMBOAT NEW WORLD, EDWARD MINTURN, WILLIAM MENZIE, and WILLIAM H. WEBB, Claimants and Appellants, v. FREDERICK G. KING.

16 H. 469.

Though the master of a steamboat is, *prima facie*, the agent of the owner to do only what is usually done by such masters in such employment, yet different employments may and do have different usages, and thus confer on masters different powers. And where it was usual to permit persons whose employment was on board such boats, to go from place to place free of charge, a person so carried was held to be lawfully on board, and that for an injury done to him by culpable negligence in the management of the steam, the owners were liable in damages.

The theory of the three degrees of negligence examined.

If an employment requires skill, failure to exert it is culpable negligence, for which an action lies.

Under the 13th section of the act of July 7, 1838, (5 Stats. at Large, 306,) if a person is injured on board a steamboat by the injurious escape of steam, it is incumbent on the owners, in an action against them, to prove there was no negligence.

THE case is stated in the opinion of the court.

Cutting, for the appellants.

Mayer, contra.

[* 472] * CURTIS, J., delivered the opinion of the court.

This is an appeal from a decree of the district court of the United States for the northern district of California, sitting in admiralty. The libel alleges that the appellee was a passenger on board the steamer, on a voyage from Sacramento to San Francisco, in June, 1851, and that, while navigating within the ebb and

flow of the tide, a boiler flue was exploded through negligence, * and the appellee grievously scalded by the steam and hot water.

The answer admits that an explosion occurred at the time and place alleged in the libel, and that the appellee was on board and was injured thereby, but denies that he was a passenger for hire, or that the explosion was the consequence of negligence.

The evidence shows that it is customary for the masters of steamboats to permit persons whose usual employment is on board of such boats, to go from place to place free of charge; that the appellee had formerly been employed as a waiter on board this boat; and just before she sailed from Sacramento, he applied to the master for a free passage to San Francisco, which was granted to him, and he came on board.

It has been urged that the master had no power to impose any ob-

ligation on the steamboat by receiving a passenger without compensation.

But it cannot be necessary that the compensation should be in money, or that it should accrue directly to the owners of the boat. If the master acted under an authority usually exercised by masters of steamboats, if such exercise of authority must be presumed to be known to and acquiesced in by the owners, and the practice is even indirectly beneficial to them, it must be considered to have been a lawful exercise of an authority incident to his command.

It is proved that the custom thus to receive steamboat men is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it, and the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment, tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants.

It is true, the master of a steamboat, like other agents, has not an unlimited authority. He is the agent of the owner to do only what is usually done in the particular employment in which he is engaged. Such is the general result of the authorities. *Smith on Mer. Law*, 559; *Grant v. Norway*, 10 Com. B. 688, S. C. 2 Eng. L. and Eq. 337; *Pope v. Nickerson*, 3 Story, 475; *Citizens Bank v. Nantucket Steamboat Co.* 2 Story, 32. But different employments may and do have different usages, and consequently confer on the master different powers. And when, as in this case, a usage appears to be general, not unreasonable in itself, and indirectly beneficial to the owner, we are of opinion the master has [* 474] power to act under it and bind the owner.

The appellee must be deemed to have been lawfully on board under this general custom.

Whether precisely the same obligations in all respects, on the part of the master and owners and their boat, existed in his case, as in that of an ordinary passenger paying fare, we do not find it necessary to determine. In the *Philadelphia and Reading Railroad Company v. Derby*, 14 How. 486, which was a case of gratuitous carriage of a passenger on a railroad, this court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance

or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross."

We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law.

The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. In *Storer v. Gowen*, 18 Maine, 177, the supreme court of Maine say: "How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define." Mr. Justice Story, *Bailments*, § 11, says: "Indeed, what is common or ordinary diligence is more a matter of fact than of law." If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned.

Recently, the judges of several courts have expressed their [*475] *disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them. *Wilson v. Brett*, 11 Meeson and Wels. 113; *Wyld v. Pickford*, 8 *ibid.* 443, 461, 462; *Hinton v. Dibbin*, 2 Q. B. 646, 651. It must be confessed that the difficulty in defining gross negligence, which is apparent in perusing such cases as *Tracy et al. v. Wood*, 3 Mason, 132, and *Foster v. The Essex Bank*, 17 Mass. 479, would alone be sufficient to justify these complaints. It may be added that some of the ablest commentators on the Roman law, and on the civil code of France, have wholly repudiated this theory of three degrees of diligence, as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties. See *Toullier's Droit Civil*, 6th vol. p. 239, &c.; 11th vol. p. 203, &c. *Makeley, Man. Du Droit Romain*, 191, &c.

But whether this term, gross negligence, be used or not, this particular case is one of gross negligence, according to the tests which have been applied to such a case.

In the first place, it is settled, that "the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part." Story on Bailments, § 15.

It is also settled, that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence. Thus, Heath J., in *Shields v. Blackburne*, 1 H. Bl. 161, says: "If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery." And Lord Loughborough declares that an omission to use skill is gross negligence. Mr. Justice Story, although he controverts the doctrine of Pothier, that any negligence renders a gratuitous bailee responsible for the loss occasioned by his fault, and also the distinction made by Sir William Jones, between an undertaking to carry and an undertaking to do work, yet admits that the responsibility exists when there is a want of due skill, or an omission to exercise it. And the same may be said of Mr. Justice Porter, in *Percy v. Millaudon*, 20 Mart. 75. This qualification of the rule is also recognized in *Stanton et al. v. Bell et al.* 2 Hawks, 145.

That the proper management of the boilers and machinery of a steamboat requires skill, must be admitted. Indeed, by the act of congress of August 30, 1852,¹ great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully, endangers, to a frightful extent, the lives [* 476] and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too painfully proves. We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of the gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, congress has, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be

¹ 10 Stats. at Large, 61.

proved to lay the foundation of an action for damages to person or property.

The thirteenth section of the act of July 7, 1838, 5 Stats. at Large, 306, provides: "That in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

This case falls within this section; and it is therefore incumbent on the claimants to prove that no negligence has been committed by those in their employment.

Have they proved this? It appears that the disaster happened a short distance above Benicia; that another steamer, called The Wilson G. Hunt, was then about a quarter of a mile astern of The New World, and that the boat first arriving at Benicia got from twenty-five to fifty passengers. The pilot of The Hunt says, he hardly knows whether the boats were racing, but both were doing their best, and this is confirmed by the assistant pilot, who says, the boats were always supposed to come down as fast as possible; the first boat at Benicia gets from twenty-five to fifty passengers. And he adds that at a particular place, called "the slough," The Hunt attempted to pass The New World. Fay, a passenger on board The New World, swears, that, on two occasions, before reaching "the slough," The Hunt attempted to pass The New World, and failed; that, to his knowledge, these boats had been in the habit of contending for the mastery, and on this occasion both were doing their best. The fact that The Hunt attempted to pass The New World in "the slough" is denied by two of the respondents' wit-

nesses, but they do not meet the testimony of Fay, as to [* 477] the two previous *attempts. Haskel, another passenger,

says, "about ten minutes before the explosion, I was standing looking at the engine; we saw the engineer was evidently excited by his running to a little window to look out at the boat behind. He repeated this ten or fifteen times in a very short time."

The master, clerk, engineer, assistant engineer, pilot, one fireman, and the steward of The New World, were examined on behalf of the claimants. No one of them, save the pilot, denies the fact that the boats were racing. With the exception of the pilot and the engineer, they are wholly silent on the subject. The pilot says, they were not racing. The engineer says: "We have had some little

strife between us and The Hunt, as to who should get to Benicia first. There was an agreement made that we should go first. I think it was a trip or two before." Considering that the master says nothing of any such agreement, that it does not appear to have been known to any other person on board either boat, that this witness and the pilot were both directly connected with and responsible for the negligence charged, and that the fact of racing is substantially sworn to by two passengers on board The New World, and by the pilot and assistant pilot of The Hunt, and is not denied by the master of The New World, we cannot avoid the conclusion that the fact is proved. And certainly it greatly increases the burden which the act of congress has thrown on the claimants. It is possible that those managing a steamboat, engaged in a race, may use all that care and adopt all those precautions which the dangerous power they employ renders necessary to safety. But it is highly improbable. The excitement engendered by strife for victory is not a fit temper of mind for men on whose judgment, vigilance, coolness, and skill, the lives of passengers depend. And when a disastrous explosion has occurred in such a strife, this court cannot treat the evidence of those engaged in it, and *primâ facie* responsible for its consequences, as sufficient to disprove their own negligence, which the law presumes.

We consider the testimony of the assistant engineer and fireman, who are the only witnesses who speak to the quantity of steam carried, as wholly unsatisfactory. They say, the boiler was allowed, by the inspector, to carry forty pounds to the inch, and that when the explosion occurred, they were carrying but twenty-three pounds. The principal engineer says, he does not remember how much steam they had on. The master is silent on the subject, and says nothing as to the speed of the boat. The clear weight of the evidence is that the boat was, to use the language of some of the witnesses, doing its best. We are not convinced that she was carrying only twenty-three pounds, little more than half her allowance.

* This is the only evidence by which the claimants have [* 478] endeavored to encounter the presumption of negligence. In our opinion it does not disprove it; and consequently the claimants are liable to damages, and the decree of the district court must be affirmed.

Daniel, J., dissented.

DANIEL, J. From the opinion of the majority of the judges in this case I dissent.

That the appellee, in this case, has sustained a serious injury, cannot, consistently with the proofs adduced, be denied, and it is probable that the compensation which has been awarded him may not be more than commensurate with the wrong inflicted upon him, or greater than that for which the appellants were justly responsible. But the only question, in my view, which this court can properly determine, relates neither to the character nor extent of the injury complained of, nor to the adequacy of the redress which has been decreed. It is a question involving the power of this court to deal with the rights or duties of the parties to this controversy in the attitude in which they are presented to its notice.

This is a proceeding under the admiralty jurisdiction, as vested in the courts of the United States by the constitution. It is the case of an alleged marine tort. The libel omits to allege that the act constituting the gravamen of the complaint, did not occur either *infra corpus comitatus*, nor *infra fauces terræ*. It will hardly be denied that the rule of the admiralty in England, at the time of the adoption of the constitution, confined the jurisdiction of the admiralty within the limits above referred to, or that the admiralty never had in England, general or concurrent jurisdiction with the courts of common law, but was restricted to controversies for the trial of which the *pais*, or local jury, could not be obtained. Having, on a former occasion, investigated extensively the origin and extent of the admiralty powers of the federal courts, (see *New Jersey Steam Navigation Company v. Merchants Bank*, 6 How. 344,) it is not now my purpose to do more than to refer to that examination, and to maintain my own consistency, by the reassertion of my adherence to the constitutional principles therein propounded, principles by which I am constrained to deny the jurisdiction of this court and of the circuit court, in the case before us.

It is true that the libel in this case alleges the injury to have been committed within the ebb and flow of the tide, but it is obvious that such an allegation does not satisfy the description [* 479] * of an occurrence, which to give jurisdiction, must be marine or nautical in its character and locality. Although all tides are said to proceed from the action of the moon upon the ocean, it would be a *non sequitur*, should the conclusion be attempted, that therefore every river subject to tides was an ocean.

It to my view seems manifest that an extension of admiralty jurisdiction over all waters affected by the ebb and flow of the tide, would not merely be a violation of settled and venerable authority, but would necessarily result in the most mischievous interference with the common law and internal and police powers of every com-

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munity. Take one illustration, which may be drawn from subjects within our immediate view.

In the small estuary which traverses the avenue leading to this court room, the tides of the Potomac regularly ebb and flow, although upon the receding of the tide this watercourse can be stepped over. Upon the return of the tide, there may be seen on this water numerous boys bathing or angling, or passing in canoes. Should a conflict arise amongst these urchins, originating either in collision of canoes or an entangling of fishing lines, or from any similar cause, this would present a case of admiralty jurisdiction fully as legitimate as that which is made by the libel in the case before us. Yet, the corporate authorities of Washington would think strangely, no doubt, of finding themselves, by the exertion of a great national power designed for national purposes, ousted of their power to keep the peace, and to inflict upon rioters within their notorious limits, the discipline of the workhouse.

I am opposed to every assumption of authority by forced implications and constructions. I would construe the constitution and the statutes by the received acceptation of words in use at the time of their creation; and, in obedience to this rule, I feel bound to express my belief that, in the present and in all similar cases, this court has no jurisdiction under the constitution of the United States.

20 H. 296.

WILLIAM H. SEYMOUR and DAYTON S. MORGAN, Plaintiffs in Error,
v. CYRUS H. McCORMICK.

16 H. 480.

Actual damages are to be found by a jury in a patent cause.

What they are, cannot be determined by any one precise rule of law, applicable to all cases.

If the patentee finds it for his interest to retain the entire monopoly, the profits realized by the infringer may afford a rule.

If he habitually sells licenses, the price of a license may afford the proper measure.

To instruct that the measure of damages is the same, whether the patent covers an entire machine or an improvement on it, is erroneous.

There is no legal presumption binding on a jury, that third persons would have purchased of the patentee what they bought of the infringer, if the latter had not made and sold the thing patented.

THE case is stated in the opinion of the court.

Gillet, (with whom was *Selden*,) for the plaintiffs.

Stevens and *Johnson*, contra.

* GRIER, J., delivered the opinion of the court.

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The plaintiff below, Cyrus H. McCormick, brought this

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action against the plaintiffs in error, Seymour and Morgan, for the infringement of his patent right. The declaration consisted of two counts.

The first alleged that the plaintiff was the true and original inventor of certain new and useful improvements in the machine for reaping all kinds of small grain, for which he obtained letters-patent on the 21st of June, 1834. And, moreover, that the plaintiff was the inventor of certain improvements upon the aforesaid patented reaping machine, for which he obtained letters-patent on the 31st day of January, 1845. And it charged that the defendant had made three hundred reaping machines which infringed the inventions and improvements, fourthly and fifthly claimed in the schedule or specification of the last-named letters-patent.

The second count alleged that the plaintiff was the first inventor of certain other improvements upon his said reaping machine before patented, for which he obtained letters-patent on the 23d day of October, 1847. And that the defendant manufactured and constructed three hundred machines embracing the principles of the last-named invention and improvements. The defendants pleaded not guilty, and the case being called for trial in October, 1851, they prayed a continuance of the cause on account of the absence of certain witnesses material to their defence against the charge laid in the first count, to wit, the infringement of the patent of 1845.

The court intimated an opinion that the affidavit was sufficient to put off the trial of the cause, whereupon the plaintiff's counsel stated to the court that, rather than have the trial put off, they would not on said trial seek to recover against the defendant on account of any alleged infringement or violation by the defendants of the plaintiff's rights under his letters-patent bearing date January 31, 1845, set forth in his declaration, but would proceed solely for a violation of the rights secured to him by his letters-patent bearing date October 23, 1847, set forth in his declaration, under the last claim specified in that patent relating to the seat for the raker.

The trial then proceeded on the last count in the declaration for the infringement by defendants of this last patent, and [*486] testimony * offered to show that the plaintiff was not the original and first inventor of the reaping machine as described in his patents of 1834 and 1845, was rejected.

Numerous exceptions were taken by defendants in the course of the trial and to various instructions contained in the charge of the court. Most of these involve no general or important legal principle, and could not be understood without prolix statements with regard to the facts of the case and the structure of the peculiar machines

To notice them in detail, would be both tedious and unprofitable. We deem it sufficient, therefore, to say that the defendants have failed to support their exceptions as to the rulings of the court concerning the testimony, and that the charge of the learned judge is an able and correct exposition of the law as applicable to the case, with the exception of the points which we propose now to examine, and which are contained in the following portion of the charge.

“The only remaining question is that of damages. The rule of law on this subject is a very simple one. The only difficulty that can exist, is in the application of it to the evidence in the case. The general rule is, that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement, and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendants had not interfered with his rights.

“That view proceeds upon the principle, that if the defendants had not interfered with the patentee, all persons who bought the defendants' machines, would necessarily have been obliged to go to the patentee and purchase his machine. That is the principle on which the profits that the patentee might have made out of the machines thus unlawfully constructed, present a ground that may aid the jury in arriving at the damages which the patentee has sustained.

“It has been suggested, by the counsel for the defendants, that, inasmuch as the claims of the plaintiff in question here are simply for improvements upon his old reaping machine, and not for an entire machine and every part of it, the damages should be limited in proportion to the value of the improvements thus made, and that therefore a distinction exists, in regard to the rule of damages, between an infringement of an entire machine and an infringement of a mere improvement on a machine. I do not assent to this distinction. On the contrary, according to my view of the law regulating the measure of damages in cases of this kind, the rule which is to govern is the same, whether the patent covers an entire machine or an improvement on a machine. Those who choose to use the old machine have a right to use it, without *incurring any [* 487] responsibility; but if they ingraft on it the improvement secured to the patentee, and use the machine with that improvement, they have deprived the patentee of the fruits of his invention, the same as if he had invented the entire machine; because it is his improvement that gives value to the machine on account of the public demand for it. The old instrument is abandoned, and the public call for the improved instrument; and the whole instrument, with the improvement upon it, belongs to the patentee. Any person has

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a right to use the old machine; and if an inventor ingrafts upon an old machine, which he has a right to use, an improvement that makes it superior to any thing of the kind for the accomplishment of its purposes, he is entitled to the benefit of the operation of the machine under all circumstances, with the improvement ingrafted upon it, to the same degree in which the original inventor is entitled to the old machine.

“There are some data, furnished by the counsel on both sides, which it is proper the jury should take into view in ascertaining the damages, provided they arrive at this question in the case. It is conceded that just three hundred machines have been made by the defendants, of the description to which I have called your attention; and testimony has been gone into on both sides, for the purpose of showing the cost of the machines, and the prices at which they sold. In order to ascertain the profits accruing to the party who makes machines of this description, you must first ascertain the cost of the materials and labor, and the interest on the capital used in the manufacture of the machines. You must also take into account the expenses to which the manufacturer is subjected in putting them into market, such as that of agencies and transportation, also of insurance; and where the article is sold on credit, a deduction must also be made for bad debts. All these things must be taken into account, in order to bring into the cost every element that properly goes to constitute it in the hands of the manufacturer. When you have ascertained the aggregate sum of the cost, deduct it from the price paid by the purchaser, and you have the net profit on each machine. By this process, you are enabled to approximate to something like the actual loss that the patentee sustains in a case where his right has been violated by persons interfering with him and putting into market his improvement.”

The plaintiffs in error complain that these rules with regard to damages, as thus laid down by the court, are incorrect, and have produced a verdict for most ruinous damages, far beyond any thing justified by the facts of the case. 1. Because the jury were instructed that it is a legal presumption, that if defendant [* 488] * had not made and sold machines, all persons who bought the defendant's machines would necessarily have been compelled to go to the patentee and purchase his machines. That this principle was enunciated as a binding principle of law, although the plaintiff below had given no evidence to show that he could have made and sold a single machine more than he did, or was injured in any way by the competition of the defendants, or hindered from selling all he made or could make. And, secondly, because the jury

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were instructed that the measure of damages for infringing a patented improvement on a machine in public use is the same as if the defendant had pirated the whole machine and every improvement on it previously made, and as a consequence that the plaintiff below had a right to recover as great damages for the infringement of the patent in his second count, as if he had proceeded on both counts of his declaration, and shown the infringement of all the patents claimed, and that, in consequence of these instructions, they have been amerced in damages to the enormous sum of \$17,306.66, and with costs to nearly the round sum of \$20,000.

We are of opinion that the plaintiffs in error have just reason of complaint, as regards these instructions and their consequent result.

The first patent act, of 1790,¹ made the infringer of a patent liable to "forfeit and pay to the patentee such damages as should be assessed by a jury, and, moreover, to forfeit to the person aggrieved the infringing machine."

The act of 1793² enacted, "that the infringer should forfeit and pay to the patentee a sum equal to three times the price for which the patentee has usually sold or licensed to other persons the use of said invention." Here, the price of a license is assumed to be a just measure of single damages, and the forfeiture, by way of penalty, is fixed at treble that sum. But, as experience began to show that some inventions or discoveries had their chief value in a monopoly of use by the inventor, and not in a sale of licenses, the value of a license could not be made a universal rule, as a measure of damages. The act of 17th of April, 1800,³ changed the rule, and compelled the infringer "to forfeit and pay to the patentee a sum equal to three times the actual damage sustained by such patentee." This act continued in force till 1836,⁴ when the act now in force was passed.

Experience had shown the very great injustice of a horizontal rule equally affecting all cases, without regard to their peculiar merits. The defendant who acted in ignorance or good faith, claiming under a junior patent, was made liable to the same penalty with the wanton and malicious pirate. This rule was manifestly unjust. For there is no good reason why taking a *man's property [* 489] in an invention should be trebly punished, while the measure of damages as to other property is single and actual damages. It is true, where the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant.

In order to obviate this injustice, the patent act of 1836 confines the jury to the assessment of "actual damages." The power to in-

¹ 1 Stats. at Large, 109.

² Ibid. 318.

³ 2 Ibid. 37.

⁴ 5 Ibid. 117.

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flict vindictive or punitive damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the jury.

It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there cannot, in the nature of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted. A man who invents or discovers a new composition of matter, such as vulcanized India rubber, or a valuable medicine, may find his profit to consist in a close monopoly, forbidding any one to compete with him in the market, the patentee being himself able to supply the whole demand at his own price. If he should grant licenses to all who might desire to manufacture his composition, mutual competition might destroy the value of each license. This may be the case, also, where the patentee is the inventor of an entire new machine. If any person could use the invention or discovery by paying what a jury might suppose to be the fair value of a license, it is plain that competition would destroy the whole value of the monopoly. In such cases the profit of the infringer may be the only criterion of the actual damage of the patentee. But one who invents some improvement in the machinery of a mill, could not claim that the profits of the whole mill should be the measure of damages for the use of his improvement. And where the profit of the patentee consists neither in the exclusive use of the thing invented or discovered, nor in the monopoly of making it for others to use, it is evident that this rule could not apply. The case of Stimpson's patent for a turn-out in a railroad may be cited as an example. It was the interest of the patentee that all railroads should use his invention, provided they paid him the price of his license. He could not make his profit by selling it as a complete and separate machine. An infringer of such a patent could not be liable to damages to the amount of the profits of his railroad, nor could the actual damages to the patentee be measured by any known ratio of the profits on the road. The only actual damage which the patentee has suffered in such a case is the non-payment of the price which he has put on his license, with [*490] interest, and no * more. There may be cases, as where the thing has been used but for a short time, in which the jury should find less than that sum; and there may be cases where, from some peculiar circumstance, the patentee may show actual damage to a larger amount. Of this a jury must judge from the evidence, under instructions from the court that they can find only such damages as have actually been proved to have been sustained. Where

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an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvement, he has himself fixed the average of his actual damage, when his invention has been used without his license. If he claims any thing above that amount, he is bound to substantiate his claim by clear and distinct evidence. When he has himself established the market value of his improvement as separate and distinct from the other machinery with which it is connected, he can have no claim in justice or equity to make the profits of the whole machine the measure of his demand. It is only where, from the peculiar circumstances of the case, no other rule can be found, that the defendant's profits become the criterion of the plaintiff's loss. Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee "would have made, if the infringer had not interfered with his rights," is a question of fact and not "a judgment of law." The question is not what speculatively he may have lost, but what actually he did lose. It is not a "judgment of law" or necessary legal inference, that if all the manufacturers of steam-engines and locomotives, who have built and sold engines with a patented cut-off, or steam whistle, had not made such engines, that therefore all the purchasers of engines would have employed the patentee of the cut-off, or whistle; and that, consequently, such patentee is entitled to all the profits made in the manufacture of such steam-engines by those who may have used his improvement without his license. Such a rule of damages would be better entitled to the epitaph of "speculative," "imaginary," or "fanciful," than that of "actual."

If the measure of damages be the same whether a patent be for an entire machine or for some improvement in some part of it, then it follows that each one who has patented an improvement in any portion of a steam-engine or other complex machines, may recover the whole profits arising from the skill, labor, material, and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his whole profits to each of a dozen or more several inventors of some small improvement in the engine he has built. By this doctrine even the smallest part is made equal to the whole, and "actual damages" to [* 491] the plaintiff may be converted into an unlimited series of penalties on the defendant.

We think, therefore, that it is a very grave error to instruct a jury "that as to the measure of damages, the same rule is to govern, whether the patent covers an entire machine or an improvement on a machine."

It appears, from the evidence in this case, that McCormick sold licenses to use his original patent of 1834 for twenty dollars each. He sold licenses to the defendants to make and vend machines containing all his improvements to any extent for thirty dollars for each machine, or at an average of ten dollars for each of his three patents. The defendants made and sold many hundred machines, and paid that price and no more. They refused to pay for the last three hundred machines, under a belief that the plaintiff was not the original inventor of this last improvement, whereby a seat for the raker was provided on the machine, so that he could ride, and not be compelled to walk as before. Beyond the refusal to pay the usual license price, the plaintiff showed no actual damage. The jury gave a verdict for nearly double the amount demanded for the use of three several patents, in a suit where the defendant was charged with violating one only, and that for an improvement of small importance when compared with the whole machine. This enormous and ruinous verdict is but a corollary or necessary consequence from the instructions given in that portion of the charge of the court on which we have been commenting, and of the doctrines therein asserted, and to which this court cannot give their assent or concurrence.

The judgment of the circuit court is reversed, with a *venire de novo*.
20 H. 378; 23 H. 487.

HENRIETTA AMIS, Executrix, and WILLIAM PERKINS, Executor, of
JUNIUS AMIS, deceased, Appellants, v. DAVID MYERS.

16 H. 492.

A question of fact respecting the ownership of slaves.

THE case is stated in the opinion of the court.

Goold and Lawrence, for the appellants.

Baxter, contra.

CAMPBELL, J., delivered the opinion of the court.

The plaintiff filed his bill in the circuit court of the United States for the eastern district of Louisiana, to restrain the sale of certain slaves taken in execution of a judgment of that court, in favor of the defendant against William D. Amis.

[* 493] * The case of the plaintiff is, that the slaves are his lawful property, and are not subject to the execution of the defendant. The defendant denies this allegation, and insists that the property in the slaves is vested in his debtor.

 Guitard v. Stoddard. 16 H.

The evidence shows that the slaves were purchased in New Orleans, by the defendant in the execution. He provided the purchase-money by procuring the acceptance and discount of a draft at thirty days' date, by a mercantile firm, upon the promise of sending funds for its payment at its maturity. He was disabled from doing this by the occurrence of facts that are detailed in the evidence, and the plaintiff, for his relief, caused the draft to be paid by his own factor, and agreed to take the slaves as his property.

The bill of sale, given to the defendant in execution, did not contain the name of the vendee, but a blank space was left for the insertion of the name. When this arrangement took place, the plaintiff's name was inserted and the paper given to him. The slaves have been at his plantation, and although William D. Amis resides there, no act of mastership is shown, and he denies having any interest in the slaves.

We think this testimony establishes the case of the plaintiff.

It is proper to notice that this case is not one of equitable cognizance. The plaintiff had a clear and adequate remedy at law, under the code of practice of Louisiana. C. P. 298, § 7.

It is not usual for this court to take an exception of this nature on its own motion and where no objection has been made by the defendant; but this case is one so clearly beyond the limits of the equitable jurisdiction of the circuit court, that the fact is noticed that it may not serve as a precedent.

The decree of the circuit court is reversed, and the cause remanded with directions to enter a decree to perpetuate the injunction.

JOSEPH GUITARD, FREDERICK STEUDEMAN and MARY, his Wife, and GEORGE BROWN and JULIA, his Wife, Plaintiffs in Error, v. HENRY STODDARD.

16 H. 494.

Under the act of congress of June 12, 1812, (2 Stats. at Large, 748,) respecting town and village lots, out lots, &c., in Missouri, it was not necessary that the claimant of an out lot should have had, either under the French or Spanish authorities, or from the United States, any written recognition of his title, or any public survey; nor was he required by the supplementary act of 1824, (4 Stats. at Large, 65,) to present the evidence of his claim and have it recognized. He might do so, and thus estop the United States and those claiming under them by subsequent grant; but he might also rely on proving the facts, made needful to his title by the act of 1812, through parol evidence, if his possession should be disturbed.

ERROR to the circuit court of the United States for the district of Missouri. The case is stated in the opinion of the court.

Williams and Geyer, for the plaintiffs.

Johnson, (with whom was *Ewing*,) contra.

[*507] * CAMPBELL, J., delivered the opinion of the court.

The plaintiffs claim a lot of ground in the city of St. Louis, as representatives of Paul Guitard, an ancient inhabitant of that city, under a confirmation in the act of congress of the 13th of June, 1812, for the settlement of land claims in Missouri. 2 Stats. at Large, 748.

The record shows that Guitard, from 1785-6 till the common fence which surrounded and protected the field lots and commons of that city was thrown down, in 1797 or 8, claimed and cultivated a parcel of land, one arpen in width and forty in depth, in the Cul-de-sac Prairie. The tract claimed was called Guitard's Cul-de-sac field to its whole extent, and was in the usual form of field lots in that village. His cultivation did not extend over the whole claim, nor was it ascertained whether the portion sued for was within that part cultivated. There were eleven other lots of the same description, claimed and cultivated at that period by different persons in the Cul-de-sac Prairie lying together, that of Guitard's being to the north of the others. The land sued for is within the survey directed by the first section of the act referred to. The defendant produced a patent from the United States for the land in dispute; but as the

case was determined upon the title of the plaintiffs, that [*508] becomes of *no importance. The circuit court instructed the jury: "That there having been no concession, nor grant, nor survey, nor permission to cultivate or possess the land claimed by Paul Guitard to said Guitard under and by the Spanish authorities or government; and no location of said claim by or under said government, nor under the French government, and no proof having been made at any time by said Paul Guitard, or those claiming under him, of any inhabitation, cultivation, or possession, or of the location and extent of said claim, either under the provisions of the act of 1812 or those of the act of the 26th of May, 1824, either before the recorder of land-titles or other United States authority; and there having been no survey or location of said land, by or under the authority of the United States, the said plaintiffs cannot now set up said claim and locate it, and prove its extent and inhabitation and cultivation by parol evidence merely." This instruction comprehends the entire case, and the examination of this will render it unnecessary to consider those given or refused upon the motions of the parties to the suit.

The act of the 13th of June, 1812, declares, that the rights, titles, claims to town or village lots, out lots, common field lots, and commons in, adjoining, and belonging to the several towns and villages named in the act, including St. Louis, which lots have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, shall be and they are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto."

This act has been repeatedly under the consideration of this court, and to ascertain what has been decided upon it will facilitate the present inquiry. In *Chouteau v. Eckhart*, 2 How. 345, the defendant relied upon the title of the village of St. Charles to the *locus in quo*, as being a part of the commons of that village, and confirmed to it by the act of June, 1812. In that case, the right of the village was established from a concession made by the lieutenant-governor of upper Louisiana, and a formal survey by the Spanish authority. The judgment of this court was, that a title of this description was confirmed by the act of 1812, and that this confirmation excluded a Spanish concession of an earlier date, which had been confirmed by a subsequent act of congress.

In the case of *Mackay v. Dillon*, 4 How. 421, the defendant defended under the claim of St. Louis to its commons, and produced evidence of a Spanish concession of a private survey which had been presented to the board of commissioners, and of proof having been made before the recorder of land titles. Whether the private survey made in 1806, and submitted to the * govern- [* 509] ment, was conclusive of boundary, was the question before the court. Mr. Justice Catron, in delivering the opinion of the court, says: "By the first section of the act of 1812, congress confirmed the claim to commons adjoining and belonging to St. Louis, with similar claims made by other towns. But no extent or boundaries were given to show what land was granted; nor is there any thing in the act of 1812 from which a court of justice can legally declare that the land set forth in the survey and proved as commons by witnesses in 1806, is the precise land congress granted; in other words, the act did not adopt the evidence laid before the board for any purpose; and the boundaries of claims thus confirmed, were designedly, as we suppose, left open to the settlement of the respective claimants by litigation in courts of justice or otherwise."

Again, in the case of *Les Bois v. Bramell*, 4 How. 457, the same learned judge says of this act, "that this was a general confirmation of the common to the town as a community, no one ever doubted,

so far as the confirmation operated on the lands of the United States."

The questions settled by this court are that the act of 1812 is a present operative grant of all the interest of the United States, in the property comprised in the act, and that the right of the grantee was not dependent upon the factum of a survey under the Spanish government.

No question before this has been submitted to the court upon the interpretation to be given to the "rights, titles, and claims" which were the subject of the confirmation of the United States.

The instruction given to the jury by the circuit court implies that the confirmer, before he can acquire a standing in court, must originally have had or must subsequently have placed upon his title or claim an additional mark of a public authority besides this act of congress; that he must evince his right or claim by some concession, survey, or permission to settle, cultivate, or possess, or some recognition of his claim under the provisions of some act of congress by some officer of the executive department, indicative of its location and extent. The laxity of the legislation in the act of 1812 is painfully evident, when the fact is declared that the large and growing cities of the State of Missouri have their site upon the land comprehended in this confirmation. Nevertheless, an attempt to correct the mischief would probably create more confusion and disorder than the act has produced.

The act, in the form in which it exists, was adopted by congress upon the solicitation and counsel of citizens of Missouri, interested in the subject and well acquainted with the conditions of [* 510] its population. The towns and villages named in it * were then, and for many years continued to be small, and the property of no great importance. During this time conflicting rights and pretensions were adjusted, facts necessary to sustain claims to property ascertained, and the business and intercourse of the inhabitants accommodated to its conditions. The act itself, with all the circumstances of the inhabitants before and at the time of its passage, have formed the subject of legal judgments and professional opinions upon which mighty interests have grown up and now repose. This court fully appreciates the danger of disturbing those interests and of contradicting those opinions and judgments.

The act of 1812 makes no requisition for a concession, survey, permission to settle, cultivate, or possess, or of any location by a public authority as the basis of the right, title, and claim, upon which its confirmatory provisions operate. It may be very true that there could have been originally no legitimate right or claim without some

such authority. Congress, however, in this act, was not dealing with written or formal evidences of right. Such claims in Missouri have been provided for by other acts. These pretensions to town and village lots formed a residuum of a mass of rights, titles, and claims, which congress was advised could be equitably and summarily disposed of by the abandonment of its own rights to the property, and a reference of the whole subject to the parties concerned. Congress afforded no means of authenticating the rights, titles, and claims of the several confirmees. No board was appointed in the act to receive the evidence nor to adjust contradictory pretensions.

No officer was appointed to survey or to locate any individual right. All the facts requisite to sustain the confirmation—what were village or town lots, out lots, common field lots, or commons—what were the conditions of inhabitation, cultivation, or possession, to bring the claimant within the act, were referred to the judicial tribunals. The act has been most carefully and patiently considered in the supreme court of Missouri, and conclusions have been promulgated, which comprehend nearly all the questions which can arise upon it.

In *Vasseur v. Benton*, 1 Mo. Rep. 300, that court says: "We are of opinion that the claims to town or village lots, which had been inhabited, cultivated, or possessed, prior to the 20th of December, 1803, are by the express words of the act *ipso facto* confirmed as to the right of the United States." In *Lajoie v. Primm*, 3 Mo. Rep. 529, the court says: "The great object of the act was to quiet the villages in their titles to property (so far as the government was concerned) which had been acquired in many instances by possession merely, under an express or implied permission to settle, and which had passed from *hand to hand without any [* 511] formal conveyance. In such cases, possession was the only thing to which they could look; and taking it for granted that those who were found in possession at the time the country was ceded, or who had been last in possession prior thereto, were the rightful owners—the confirmation was intended for their benefit." In *Page v. Scheibel*, 11 Mo. 167, the same court, says: "The whole history of the progress of settlements in the French villages, so far as it has been developed in the cases which have come up to this court, shows that the villagers did not venture to take possession of the lots, either for cultivation or inhabitation, without a formal permission of the lieutenant-governor, or the commandant of the post. These permissions, it is also probable, were most generally in writing, and accompanied by a survey made by an officer selected and authorized by the government.

But the title of the claimants under this government does not depend upon the existence or proof of any such documents. Congress did not think proper to require it. In all probability, the fact that possession, inhabitation, and cultivation could not exist under the former government without such previous permission from the authorities of that government, was known to the framers of the act of 1812, and constituted the prominent reason for dispensing with any proof of this character in order to make out a title under that act. However this may be, the act requires no such proof, but confirms the title upon possession, inhabitation, or cultivation alone, without regard to the legality of the origin of such title."

We have quoted these portions of the reports of those cases to express our concurrence in the conclusions they present.

We shall now inquire whether it was necessary for the confirmee to present the evidence of his claim under the act of 1824. 4 Stats. at Large, 65, supplementary to the act of 1812?

This act makes it the duty of the claimants of town and village lots "to proceed, within eighteen months after the passage thereof, to designate them by proving the fact of inhabitation, &c., and the boundaries and extent of each claim, so as to enable the surveyor-general to distinguish the private from the vacant lots." No forfeiture was imposed for a non-compliance. The confirmee, by a compliance, obtained a recognition of his boundaries from the United States, and consequently evidence against every person intruding, or claiming from the government *ex post facto*. The government did not by that act impair the effect and operation of its act of 1812.

Under the act of 1812, each confirmee was compelled, whenever his title was disputed, to adduce proof of the conditions upon which the confirmation depended. As the facts of inhab-
[* 512] itation, * possession, and cultivation at a designated period, are facts *in pais*, it followed as a matter of course that parol evidence is admissible to establish them. In the case of *Hickie v. Starke*, 1 Pet. 98, a question arose upon an act of congress which confirmed to "actual settlers" within a ceded territory all the grants legally executed prior to a designated day, and this court held that the fact of "a settlement on that day" must be established, and proof of occupancy and cultivation was adduced. In *The City of Mobile v. Eslava*, 16 Pet. 235, certain water lots were confirmed to the proprietors of the front lots adjacent thereto, who had improved them before the passage of the act of congress, and this court sustained the title upon parol proof of location and improvements. The court said: "Being proprietor of the front lot and having improved the water lot opposite and east of Water street, constitute the conditions

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on which the right, if any, under the statute vests. In his charge to the jury, the judge laid down these conditions in clear terms; and instructed the jury, if the facts brought the defendant within them, that they should find against the plaintiffs. The jury did so find, and this is conclusive of the facts of the case."

The question of boundary under the act of 1812, as it was decided in *Mackay v. Dillon*, was left open to the settlement of the respective claimants by litigation, in the courts of justice, or otherwise. Nor has this court, in any case, decided that statutes, which operate to confirm an existing and recognized claim or title with ascertained boundaries, or boundaries which could be ascertained, are inoperative without a survey, or made one necessary to the perfection of the title. A survey, approved by the United States, and accepted by the confirmer, is always important to the confirmer; for, as is said by the court in *Menard's Heirs v. Massy*, 8 How. 294, it is conclusive evidence as against the United States, that the land granted by the confirmation of congress was the same described and bounded by the survey, unless an appeal was taken by either party or an opposing claimant to the commissioner of the land-office. This consideration depends upon the fact that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped.

The cases of *Harrison v. Page*, 16 Mo. 182; *Gamache v. Piquignot*, 17 Mo. 310, which has been affirmed at the present session of this court; and *Soulard v. Clarke*, are in harmony with the views we have expressed upon the latter branch of the instructions of the circuit court.

We think it proper to state, that we express no opinion upon the effect of the evidence to establish the plaintiff's title as a subsisting title, and none upon the claim to such of the land as lies * beyond the boundary line, settled by the survey of [* 513] the United States under the first section of the act of 1812.

The judgment of the circuit court is reversed, and the cause remanded.

18 H. 186; 1 B. 595.

JAMES IRWIN, Appellant, v. THE UNITED STATES.

16 H. 513.

Construction of a grant of water of a spring.

The practical construction put on the grant by the grantees, continued through sixteen years, held to be evidence of what was intended to be conveyed.

APPEAL from the circuit court of the United States for the western district of Pennsylvania. The case is stated in the opinion of the court.

Wylie and Ritchie, for the plaintiff.

Cushing, (attorney-general,) *contra*.

[* 522] * GRIER, J., delivered the opinion of the court.

The appellant, James Irwin, was respondent below to a bill filed by the United States, in the nature of a bill *quia timet*, in which Irwin was charged with threatening to cut off certain pipes conveying water to the United States arsenal, near Pittsburg. The whole merits of the case are involved in the construction to be put on a certain deed under which the United States claimed to have a right to "one half of the water" delivered from a certain spring or reservoir. The parties both claim under William F. Hamilton and W. V. Robinson, who conveyed to the United States "the right and privilege to use, divert, and carry away from the fountain spring, &c., by which the woollen factory of grantors is now supplied, so much water as will pass through a pipe or tube of equal diameter, with one that shall convey the water from the said spring, upon the same level therewith to the factory of said grantors, and to proceed from a common cistern or head to be erected by the said United States, and to convey and conduct the same through the premises of the said grantors, &c."

This grant to the United States was made in November, 1836, for the consideration of \$2,500. Without stating, in so many words, that the water from the common cistern is to be divided equally, or each to have one half, this deed points out a mode of equal distribution at the cistern. The water is to be delivered to each by a pipe or tube of equal diameter at the same level. The mode of conducting it by either party to the place of its use is not prescribed. Each might have had his share delivered into a tank or cistern of his own placed along side of the common cistern, which would have been probably the best plan. The United States were permitted to con-

duct their share of the water through the lands of the
[* 523] grantors "by * tubes or pipes" without any restriction as to the size of them. The distance from the common cistern to the arsenal of the United States, where their share of the water was to be conducted, is four times as great as that to the grantors' premises. Owing to friction, and other causes, explained by the witnesses, it was proved that the flow of water in equal tubes is in the inverse ratio of the squares of the distances. Hence an orifice or tube, capable of receiving and passing equal quantities at the fountain-head, if continued of the same size to the place of delivery, would have distributed to the United States about one sixteenth and to the vendors fifteen sixteenths. In fact, from the unevenness of the

ground over which the water must necessarily flow to the arsenal, and the quantity of deposit made in its course, such a construction of the contract would leave the United States very frequently, if not always, without any water at all.

The grantors in the deed had no intention of overreaching the grantees, by taking advantage of their want of knowledge of the science of hydraulics, or claiming a construction of their deed which would give their grantees nothing, and thus allow the grantors to again extort from the necessities of the government a double price.

Robinson, one of the grantors, was examined by the appellant as a witness, and swore that one half the water was sold, and one half reserved, "that such was the agreement." This was the practical (and only reasonable) construction put on the grant by both parties at the time it was made; and, accordingly, the officers of the United States proceeded to make a common cistern, and to ascertain the size of two tubes sufficient to convey the whole water held in common, and distribute it equally — leaving the vendors to convey their share in pipes of any size they saw fit — they used pipes to convey the water to the arsenal of such size as was deemed necessary from the distance and nature of the ground. The vendors looked on, assisted and acquiesced in all that was done. If the deed were ambiguous, and capable of a construction which would permit one party to overreach and defraud the other; if there were no such rule of law as that which gives a construction to a deed most favorable to the grantee; yet we have here a practical construction by the vendor and vendee made on the ground, and acquiesced in for sixteen years. The appellant's deed from an assignee of the original vendors, carefully refers to this sale to the United States, as a sale "of one half of the water." We are of opinion, therefore, that a reasonable construction of the deed to the United States, having reference to the principles of hydraulics, necessarily requires that each party should have half the water, and conduct it in such pipes as they see fit and proper; and * also, that assuming the deed to be [* 524] capable of the construction contended for, the parties to it have construed it honestly and correctly; and that this practical construction, having been acquiesced in by all parties interested for sixteen years, is conclusive. The appellant, whose deed purports to convey to him but one half the water, cannot now claim to put a new construction on the grant to the appellees which would give them nothing for the large consideration paid, and the appellant all for nothing. However plausible and astute the reasoning may be, on which such a claim is founded, it does not recommend itself on the ground of justice or equity.

The judgment of the circuit court is, therefore, affirmed, with costs.

Fanning v. Gregoire. 16 H.

TIMOTHY FANNING, Appellant, v. CHARLES GREGOIRE and CHARLES BOGG.

16 H. 524.

Though a city council, when acting in its legislative capacity, acts by ordinance, they may license a ferry by contract in writing, signed by the mayor.

A stipulation, by the legislature, that no court shall authorize another ferry, does not prevent the power to license another from being conferred on the government of a city, by a subsequent act of the legislature.

THE case is stated in the opinion of the court.

Wilson, for the appellant.

Platt Smith, contra.

[* 530] * M'LEAN, J., delivered the opinion of the court.

This is an appeal from the district court of the United States for the district of Iowa.

The plaintiff filed his petition in the district court of the county of Dubuque, stating that by an act of the legislative assembly of the territory of Iowa, approved the 14th of December, 1838, he was authorized to establish and keep a ferry across the Mississippi, at the town of Dubuque, and depart from and land at any place on the public landing of said town for the term of twenty years from the passage of said act; and that the act provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town; that the petitioner [* 531] was required, within * two years from the passage of the act, to use for said ferry a good and sufficient steam ferry-boat; that a sufficient number of flat boats were also required to be kept, with a competent number of hands to work them, so as to convey across the River Mississippi persons and property as might be required; that a horse ferry-boat, by an amendatory act, was substituted for a steam ferry-boat.

And the plaintiff avers, that the above acts of the legislature conferred on him the exclusive privilege of ferrying across the river at the above place during the twenty years named in the act. And he avers that in all things he has complied with the requirements of the above acts, and that, in doing so, he has incurred great expense; that at the commencement, his ferry yielded little or no profit; but he persevered in keeping it up, hoping to be remunerated for his expense in its future profits.

He represents that the defendants, confederating with others to de-

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fraud him of his ferry right, have placed upon the ferry at the town of Dubuque a steam ferry-boat for the transportation of passengers, &c., and charges them for such transportation, &c., and claim that they have a right to do so, although the twenty years of the plaintiff's grant have not yet expired. He therefore prays for an injunction, &c.

At the appearance term of said court, the defendants represented that one of them was a citizen of the State of Missouri, and the other a citizen of the State of Illinois; that the matter in controversy exceeds five hundred dollars, and they pray that the said action may be removed to the next district court of the United States, to be held in the northern division of the district of the State of Iowa, and gave the security required by law; and the cause was removed to the district court.

The defendants, in their answer, admit that the plaintiff has a charter to ferry across the River Mississippi at Dubuque, but they deny that it secures to him an exclusive right. And they say that their steam ferry-boat was put on and is run by them in accordance with a contract made with the city of Dubuque, authorizing the running of said boat for six years, from the first day of April, 1852; and they say that in running said boat they do not interfere with the right of the plaintiff other than such interference as is necessarily the result of a fair competition.

And the defendants say that the city of Dubuque entered into said contract with the said Gregoire by virtue of the power vested in the council by the fifteenth section of an act to incorporate and establish the city of Dubuque, of the 24th of February, 1847.

The act granting the ferry right to the plaintiff bears date the 14th of December, 1838. The first section provides, "that Timothy Fanning, his heirs and assigns, be and they are hereby [* 532] authorized, to establish and keep a ferry across the Mississippi River, at the town of Dubuque, in the county of Dubuque, and to depart from, and land at any place on the public landing of said town, which was set apart for public purposes by act of congress approved the 2d of July, 1836,¹ for the term of twenty years from the passage of the act."

The second section declared, "that no court or board of county commissioners shall authorize any person (unless as herein provided for by this act) to keep a ferry within the limits of the town of Dubuque." The conditions annexed were that Fanning, his heirs and assigns, should, within two years from the passage of the act, procure a sufficient steam ferry-boat, and shall keep flat boats and a sufficient number of hands for the accommodation of the public. On failure to

¹ 5 Stats. at Large, 70.

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do so, proof being made to the satisfaction of the county commissioner or the county court, the charter should be declared to be void.

By the act of July 24, 1840, a horse boat was substituted for the steam ferry-boat.

The right of the defendants arises under a contract made between the city of Dubuque and Charles Gregoire, the 11th of November, 1851; in which it was agreed by the corporation of the city, "in consideration of the covenants and stipulations hereinafter enumerated, have granted a license to Gregoire to keep a ferry across the Mississippi River, opposite the city of Dubuque, for six years from the first day of April next; it being understood that the city grant all the right it has and no more, with the privilege to land at any point opposite the city that he may choose.

Gregoire agreed to pay the city a sum of one hundred dollars annually, and to provide for said ferry a good and substantial steam ferry-boat, of sufficient capacity and dimensions to accommodate the travelling community, and to keep the same in good repair. And if the city should wish to grant the said franchise to any railroad before the expiration of the lease, they reserved the power to do so.

By the fifteenth section of the act incorporating the city, power is given to the city council to license and establish ferries across the Mississippi River, from the city of Dubuque to the opposite shore, to fix the rates of the same, and to impose reasonable fines and penalties for the violation of such laws and ordinances. This act was approved the 24th of February, 1847.

It is objected by the plaintiff's counsel, that the license set up by the defendants cannot avail them, as there is no ordinance of the council granting a ferry license to them, and that the council [*533] can only act under their corporate powers in that way.

That the council have legislative powers in regard to the police of the city is admitted, but it does not follow that a contract may not be made under their sanction by the mayor, as was done in this case. The contract was in writing, and contained stipulations in regard to the public accommodation, which were important. The old rule was, that a corporation can make no contract which shall bind it except under its seal. That doctrine has long since been overruled, and it is now fully established, that the agents of a corporation may bind it by parol.

A license having been given, which, according to its terms, must be considered binding on the corporation, it is unnecessary to look into the acts of the council regulating ferries, as they are not important, as regards the question of power. If the form of the license had been laid down in the city charter, or the mode of granting it, a conformity

to such a regulation would be required, but no such provision is found in the charter. Regulations are made by ordinances, but as to them, beyond the granting of a license in this case, we need not inquire.

The principal question in the case is, whether the right granted to Fanning is exclusive.

The language used in the territorial act, it is argued, would seem to authorize an inference, that the right was intended to be exclusive. The right was given for twenty years to Fanning and his heirs, subject to the conditions expressed. An ordinary license is not granted to a man and his heirs. But it is said the beginning of the second section is somewhat explicit on this point. It provides, "that no court or board of county commissioners, shall authorize any other person (unless as hereinafter provided for by this act) to keep a ferry within the limits of the town of Dubuque."

The condition provided for, in the act above referred to, is any neglect on the part of Fanning or his heirs, which shall incur a forfeiture of his right. The prohibition on the court and the board of county commissioners to grant a license for another ferry, it is urged, would seem to show an intent to make the grant exclusive. And that the reason for this might be found in the alleged fact, that when the ferry was first established, a considerable expenditure was required, and little or no profit was realized for some years. But all the judges present except one held that the grant was not intended to be exclusive. In their opinion this view is sustained by the consideration that, although the county court and county commissioners were prohibited from granting another license at Dubuque, yet this "prohibition did not apply to the legislature; and [*534] as it had the power to authorize another ferry, the general authority to the council to "license and establish ferries across the Mississippi River at the city," enabled the corporation, in the exercise of its discretion, to grant a license, as the legislature might have done.

This power was clearly given to the city, and it may be exercised, unless the grant of Fanning be exclusive.

The board of commissioners has been established, and the legislature has substituted in its place, for the purpose of licensing ferries at Dubuque, the city council, and it is contended that this change of the power ought not to affect the rights of the plaintiff. The restriction on the commissioners of the county does not apply, in terms, to the city council; and the court think it cannot be made to apply by implication. The license to Gregoire was granted thirteen years after the grant of the plaintiff. And it may well be presumed, from the increase of the city at Dubuque, and the great increase of the line of trade through it, that additional ferry privileges were wanted. Of this the granting power was the proper judge.

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The exclusive right set up must be clearly expressed or necessarily inferred, and the court think, that neither the one nor the other is found in the grant of the plaintiff, nor in the circumstances connected with it.

The argument that the free navigation of the Mississippi River, guaranteed by the ordinance of 1787,¹ or any right which may be supposed to arise from the exercise of the commercial power of congress, does not apply in this case. Neither of these interfere with the police power of the States, in granting ferry licenses. When navigable rivers, within the commercial power of the Union, may be obstructed, one or both of these powers may be invoked.

The decree of the district court is affirmed, with costs.

28 H. 485; 1 B. 608.

MARY E. BARNEY, by her next Friend, MAXWELL WOODHULL, Appellant, v. DAVID SAUNDERS, ROGER C. WEIGHTMAN, and SAMUEL C. BARNEY.

16 H. 535.

On a bill against the trustees under a will, the court will not reëxamine the accounts of one of them as administrator *de bonis non*, nor of another as guardian.

Under the circumstances of this case, it was held that yearly rests in the accounts of trustees were proper.

A trustee who has made usurious interest, must account for it to his *cestui que trust*.

Trustees, under a duty to invest on good security, who suffer moneys to lie on deposit at a banker's, payable on demand with interest, longer than was needful to obtain a proper investment, must bear any loss arising from the failure of the banker. But not of sums recently deposited, as they deposited their own funds.

APPEAL from the circuit court for the District of Columbia. The case is stated in the opinion of the court.

Chilton and Linton, for the appellants.

Lawrence and Bradley, contra.

[*539] * GRIER, J., delivered the opinion of the court.

The complainant, Mary E. Barney, is the only daughter of Edward DeKraft, who devised all his real estate and the residue of his personal estate to respondents, Saunders and Weightman, (together with Joseph Pearson, since dead,) on the following trusts: 1. To permit the widow to enjoy during life or widowhood, certain portions of the trust estate. 2. In trust to receive the rents, interest, dividends, &c., and to pay over quarterly to his widow, until his daughter Mary arrived at the age of eighteen, three fourths of the said rents and profits for the support and maintenance of herself and daughter, and

¹ 1 Stats. at Large, 51.

3. To lay out and invest the residue of the said rents and profits, &c., with the annual produce thereof, from time to time, in bank or other stocks or on good security.

4. At the death of the widow, the trustees to hold the estate with its increase for the sole and separate use of the daughter; and with numerous other provisions not necessary to be stated, for the purposes of this case.

The widow of the testator refused to take under the will, and claimed her legal rights; the executors also renounced, and letters of administration, with the will annexed, were granted to the widow.

* Mrs. DeKraft died in October, 1834, leaving the com- [* 540] plainant, her only child, then about four years of age. At her death, the trustees went into possession of the trust estate. Saunders, one of the trustees, took out letters of administration *de bonis non* to the estate of DeKraft; received the assets of the estate, which remained unconverted, and transferred them to himself and Weightman, as trustees.

In 1836, Weightman was appointed guardian of the person and property of the complainant.

Besides the real estate, consisting of four houses in the city, the personal property transferred to the trustees, in mortgages and stocks, amounted to about \$17,000.

The complainant intermarried with Lieut. Barney, in 1847, and attained the age of eighteen in August, 1848. In March, 1849, the bill in this case was filed, charging the trustees with divers breaches of trust, demanding their removal; on account of the trust estate, and the appointment of a receiver. The respondents filed their answer, and an account, which was referred to a master or auditor, who made report in October, 1850.

Numerous exceptions were made to this report by the complainant, which were overruled by the court below, to whose judgment this appeal is taken.

We shall notice those only which have been urged by the counsel in this court. The first is

“ I. That the trustees should have been charged with the thirty-five shares of Bank of the Metropolis stock and the dividends accruing thereupon, alleged to have been sold in 1836 by defendant, D. Saunders, to satisfy his commission as administrator *de bonis non* of Edward DeKraft, he not being entitled to such commission, and not having the right to sell the bank stock without the order of the orphans' court.”

The acts of D. Saunders as administrator *de bonis non* of DeKraft

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are not the subject of review in this suit. He settled his account as administrator in the orphans' court, and the allowances made there cannot be reviewed collaterally in another court, in a suit in which a different trust is involved. The appellant may possibly have good reason to complain that her estate has been almost devoured by the accumulation of percentages it has been compelled to pay to the numerous hands through which it has passed, but must have her remedy, if any, by demanding a review of the accounts in the court which has, in the exercise of its jurisdiction, allowed them. We are of opinion, therefore, that this exception has not been sustained.

II. The second exception is to the allowance of a credit to the trustees for sums paid to Weightman, as guardian of the complainant.

[*541] * What has been said in reference to the first exception will apply to this. Weightman's accounts, as guardian, were not before the auditor for settlement; and the guardian being entitled under the will to receive a portion (not to exceed three fourths) of the income, and apply it, if necessary, to the maintenance and education of his ward, his receipts would be good and valid vouchers to the trustees.

The guardian's account is open for revision in the orphans' court, on the petition of the complainant.

While on this subject, we would take the opportunity to remark, on the impropriety of appointing persons to trusts, however high their personal character may be, who are allowed to pay from their right hand into their left; as where A, as administrator, has to settle an account with A as trustee; and B, as trustee, to deal with B as guardian. To instance the present case: Saunders, the trustee, whose duty it was to scrutinize the accounts of the administrator *de bonis non*, from whom they receive the trust estate, is himself appointed administrator, and thus left without a check, or any one to call him to strict account except his co-trustee, for many years, and until the ward comes of age. Weightman, the other trustee, is appointed guardian, being the only person who for many years could call to account the trustees for any negligence, mismanagement, or fraud. Thus the estate of the infant is left at the mercy of chance, the solvency or insolvency, the negligence or fraud, of the trustees for sixteen years or more, with no one to call them to account. That the persons appointed in this particular case were highly honorable men, is true; but the same rule should be applied in all cases. If the estate of the infant in this case has been so fortunate as to escape, it is an accident or exception, which cannot affect the propriety of a general rule. Experience has shown that the estates of orphans are more frequently wasted and

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lost by the carelessness of good-natured and honorable men, who undertake to act as trustees, than by the fraud and cupidity of men of a different character.

Such appointments, we are aware, are generally made on *ex parte* applications, and without objection. But in all cases the court, exercising this important power, should remember that orphans are under their special protection, and should make no appointments of guardians of their estates without due inquiry and proper information.

III. The third exception is,

“That the trustees should not have been allowed and credited by five per cent. on the principal of the personal estate, and ten per cent. on the income, as was done by the auditor; that they should not be allowed any commission at all, either upon the * prin- [* 542] cipal or income of the estate; that in any event they should not be credited by any commission upon the amount of principal never collected, upon the amount of bank and other stocks.”

In England, courts of equity adhere to the principle which has its origin in the Roman law, “that a trustee shall not profit by his trust,” and therefore that a trustee shall have no allowance for his care and trouble. A different rule prevails generally, if not universally, in this country. Here, it is considered just and reasonable that a trustee should receive a fair compensation for his services; and in most cases it is gauged by a certain percentage on the amount of the estate. The allowances made by the auditor in this case are, we believe, such as are customary in similar cases, in Maryland and this district, where the trustee has performed his duties with honor and integrity. But on principles of policy as well as morality, and in order to insure a faithful and honest execution of a trust, as far as practicable, it would be inexpedient to allow a trustee who has acted dishonestly or fraudulently the same compensation with him who has acted uprightly in all respects. And there may be cases where negligence and want of care may amount to a want of good faith in the execution of the trust as little deserving of compensation as absolute fraud. If trustees, having a large estate to invest and accumulate for the benefit of an infant, for a number of years, will keep no books of account, make out no annual or other account of their trust estate; if they risk the trust funds in their own speculations; lend them to their relations without security; and in other ways show a reckless disregard of the duties which they have assumed, they can have but small claim on a court of equity for compensation in any shape or to any amount.

But while the court agree in these principles, they are equally divided in opinion as to the application of them to the present case.

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The decision of the auditor and the court below on this exception must, therefore, stand affirmed.

IV. The fourth exception is, "that the auditor did not charge the trustees upon the principle of six months' rest and compound interest."

On the subject of compounding interest on trustees, there is, and indeed could not well be, any uniform rule which could justly apply to all cases. When a trust to invest has been grossly and wilfully neglected; where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damage for undisclosed profits and in place of them. For mere neglect to invest, simple interest only is generally imposed. Six months rests [* 543] have been made only * where the amounts received were large, and such as could be easily and at all times invested.

The auditor in this case has made yearly rests. In calculating the interest on the loans, he says: "It has been charged upon the days on which it became due, first applied to the disbursements, and the balance struck at the end of each year, and interest calculated on such balances while unemployed; but such interest has not been carried into the receipts of the succeeding year, but into a separate column, and the aggregate of interest for all the years on these balances is added to the principal at the foot of the account. In this, I have followed the rule in Granberry's case, 1 Wash. 246, and Leigh, 348."

In this way, he alleges that "compound interest is in effect given on the loans, and simple interest upon the annual balances while they were uninvested, allowing a month after the termination of each rest to make the investment."

As the sums received by the trustees in this case were small, and as three fourths of the annual income were liable to be called for by the guardian for the use of his ward, we are of opinion the auditor has stated the account in this respect with fairness and discretion. The fourth exception is, therefore, not sustained.

V. The fifth exception is, "that the trustees should have been charged by the auditor with all gains, as with those arising from usurious loans, unknown friends, or otherwise."

It is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the *cestui que trust* for all the gain which he has made. If he uses the trust money in speculations, dangerous though profitable, the risk will be his own, but the profit will enure to the *cestui que trust*. Such a rule, though rigid, is necessary to prevent malversation. See *Docker v. Somes*, 2 My. & K. 655.

The money used in purchase of the house, having been settled by the transfer of the same to the complainant, the subject-matter of the present exception has been confined to the usurious interest received. It amounts only to the sum of sixty-six dollars. The auditor and the court erred in not charging that sum to the accounts. They cannot be allowed to aver that the profits made on the trust funds should be put in their own pockets, because they were unlawful gains, for fear that the conscience of the *cestui que trust* should be defiled by a participation in them. To indulge trustees in such an obliquity of conscience, would be holding out immunity for misconduct and an inducement to speculate with the trust funds, and put them in peril.

* This exception is, therefore, sustained.

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VI. The sixth exception is, "that the trustees should not have been credited by the loan to Fowler and Co. or any part thereof."

This is the most important point in the case.

The facts affecting it are reported by the auditor, as follows:—

"C. S. Fowler and Co. were brokers in this city, dealing in exchange, loans, and all the usual business of such an establishment; and, in addition, issued notes which formed a part of the circulating medium of the city. They also received deposits and allowed interest at six per cent., permitting the depositor to check on the amount to his credit at pleasure. The establishment was in good credit in 1841, and up to the failure, in the early part of 1842, many of the business men of the city deposited their funds with them. On the 22d of May, 1841, Mr. Saunders placed with Fowler and Co. \$1,181 under the following agreement, entered in a pass or check book:—

"City of Washington, 22 May, 1841.

"We hereby agree with D. Saunders, acting trustee of Edw. De Kraft's estate, to receive his deposits and to allow him six per cent. interest thereon, he to check at will. C. S. FOWLER AND CO."

And an account was opened in said pass-book, headed thus:—

"Dr. — C. S. Fowler and Co., in account with D. Saunders, acting trustee of Edw. DeKraft's estate — Cr." Other sums were afterwards added, and on the 3d of February, 1842, when the last was made, they amounted to \$5,277.38, and the checks to \$2,306.69; to the 1st of December, 1841, the checks amounted to \$1,312, and the deposits to \$3,133.88, leaving \$1,825.83 undrawn in the hands of Fowler and Co. The sums received from Cooper, and left with Fowler and Co., amounted to \$1,876, and the other sums placed with them prior to the 1st of December, 1841, to \$1,261.88, within \$50.12 of the amount checked out up to this time.

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The first sum paid in (\$1,181) was a payment made on the same 22d of May, by Cooper, on account of the principal and interest due on his mortgage. The \$1,700 paid on the 17th of August was also a part of Cooper's debt. The \$800 paid in on the 3d of February, was a part of Jones's mortgage debt. The residue is supposed to have been the current collections of the trustees from rents, dividends, &c.

"On the 14th March, 1842, Fowler and Co. failed. No interest had been calculated or paid. The account was balanced after the failure, when \$2,970.96, were found standing to the credit of Saunders, as acting trustee. It is a total loss. The credit of [* 545] * Fowler and Co. was good up to the time of their failure."

Before placing the trust fund with Fowler and Co. the trustees took the opinion of counsel, whether they could safely do so. It was in evidence, also, that at any time within the last ten years two or three thousand dollars could have been safely loaned on mortgage of real estate in this city.

By the decision of the auditor the trustees were charged with those portions of the Fowler deposit which were composed of the original capital paid in by Cooper before December, and the residue of that loss, composed of their current annual collections and of Jones's payment in February, on account of the original debt, was allowed as a credit.

The court below overruled this decision of the auditor, and ordered the charge against the trustees of \$2,521.53, on this account, to be stricken out. We are of opinion that the court below erred in making this correction of the auditor's report.

The reasons given by the auditor, including the peculiar facts of the case and the principles of law applicable to them, are well stated in his report, and we fully concur in their correctness. It will be only necessary to state them.

"The sums placed by D. Saunders, as acting trustee, with Fowler and Co., were of two descriptions, original capital, and current collections. Cooper's and Jones's payments were of the former description. 1. As to those, the general rule seems to be that a trustee, though compensated for his services, is bound to take no greater care of the trust funds than a prudent man would of his own. 2 Story's Eq. § 1268. But at the same time if the line of his duty is prescribed he must, according to Mr. Lewin, (p. 413,) "strictly pursue it, without swerving to the right hand or the left;" and if he fail to do so, and keep funds, which ought to be invested, longer on deposit than necessary, and loss occur, he must bear the loss. Whatever doubt may be entertained as to the duty of the trustees in this case,

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to invest the surplus annual income beyond the fourth, it is thought there can be no doubt as to their obligation to reinvest the original loans and debts of the testator, when paid in. If this be so, then were these sums paid by Cooper and Jones to the trustees, and by them placed with Fowler and Co., a loan or deposit with them. They were repayable with interest at pleasure.

“It looks very much like a loan, payable with interest, on demand. And if a loan, clearly the trustees are liable, because made without security of any description. The directions of the will are to invest on some security “in bank or other stocks, mortgages or other good security,” words which exclude personal security. But the trustees, in their answers, deny it was a loan, *and state [* 546] that these sums were deposits made to await a fit opportunity of investment.

“Assuming them to be such, the proof is that mortgages could be obtained at any time in this city. But trustees shall be allowed a reasonable time to select investments. What is a reasonable time? Five months have been held to be an unreasonable time to keep money on deposit. Cooper’s first payment was left with Fowler and Co. nearly ten months before the failure, from May, 1841, to March, 1842, and his second, seven months, from August to March. Jones’s was left February 3, 1842; not quite six weeks before the failure. Cooper’s would seem to have been on deposit waiting for investment too long, and, therefore, I have charged the trustees with those sums, deducting the arrear of interest due from him, and deeming three months not to be an unreasonable time to be allowed for selecting investments, have charged interest from that time. By that rule, Jones’s payment of original capital would not be chargeable to the trustees.”

We concur also in the decision of the auditor as to his refusal to charge the trustees with the balance arising from current collections and the payment of Jones, made within six weeks of the failure. The funds were deposited where the accountants deposited their own private funds. The trust funds were not mingled with their own. Other prudent and discreet men made deposits with the same bankers. The advice of counsel was taken. There was no reason to suspect the solvency of the bankers. On the whole, we do not think the trustees have acted with such want of prudence or discretion as to render them liable for the loss of this portion of the funds.

VII. As the whole trust estate has been delivered over to the *cestui que trust*, and as the trustees hold only the bare legal estate for the purpose of protecting the complainant in the enjoyment of it from the debts and control of her husband, the exception taken to the

action of the court below in refusing to remove them, becomes of no importance, and has not been insisted on.

The decree of the court below is, therefore, reversed, as to the fifth and sixth exceptions above stated, and affirmed as to the residue. And the record remitted to the court below, with directions to amend the decree in conformity with this decision.

DANIEL R. SOUTHARD, SAMUEL D. TOMPKINS, WILLIAM L. THOMPSON, MATILDA BURKS, JOSEPH R. TUNSTALL, JOHN BURKS, JAMES BURKS, SAMUEL BURKS, CHARLES BURKS, and MARY BURKS, (the four last named by WILLIAM L. THOMPSON, their next Friend,) v. GILBERT C. RUSSELL.

16 H. 547.

Whether certain evidence, alleged to be newly discovered, would authorize a bill of review. Merely impeaching the character of a material witness is not sufficient. For errors in law, on the face of decree, of an appellate court, a bill of review does not lie. Nor for any cause, after an appeal, without leave of the appellate court.

THE case is stated in the opinion of the court.

Nicholas, for the appellant.

Johnson, contra.

[* 566] * NELSON, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of Kentucky.

The present defendant, Russell, filed a bill in the court below in 1847, against the present complainant, Southard, and others, for the purpose of having the deed of a large and valuable farm or plantation, and a defeasance on refunding the purchase-money executed at the same time, declared to be a mortgage; and, that the complainant be permitted to redeem on such terms and conditions as the court might direct. The cause went to a hearing on the pleadings and proofs, and a decree was entered May term, 1849, dismissing the bill. Whereupon the complainant appealed to this court, and, after argument, the decree of the court below was reversed, the court holding the deed and defeasance to be a mortgage; and, that

[* 567] * the complainant had a right to redeem, remanding the cause to the court below, with directions to enter a decree for the complainant, and for further proceedings in conformity to the opinion of the court. The case and opinion of this court will be found in 12 How. 139.

The main question litigated in the cause, both in the court below

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and in this, was whether or not the transaction, the decree and defeasance, was a conditional sale to become absolute on the failure to refund the purchase-money within the time, or a security for the loan of money. The case was severely contested in the court below, some seventy witnesses having been examined, as appears from the original record; and was very fully argued by counsel, and considered by this court, as may be seen by a reference to the report of the case.

On the coming down of the mandate from this court to the court below, and the entry of a decree in conformity thereto, the defendants filed a bill of review, which having been entertained by the court, the cause went to a hearing on the pleadings and proofs; and after argument the court dismissed the bill. The case is now before us on an appeal from that decree. Between forty and fifty witnesses have been examined upon the issues in this bill of review; but we do not deem it material to go into the evidence, except as it respects one or two particulars, which are mainly relied on as ground for interfering with the former decree. The learned counsel for the appellant, in a very able argument laid before us, frankly and properly admits that, so far as it regards the newly discovered evidence produced, the case rests mainly upon the alleged bribery of one of the material witnesses for the complainant in the original suit, Dr. Wood; and upon the evidence of Hancock, who had not before been a witness. It is claimed that this evidence is of such a nature and character, when taken in connection with the original case, as to be controlling and decisive of the original suit in favor of the defendants; and that it is competent and admissible as newly discovered facts bearing upon the main issue in that case, within the established doctrine concerning proceedings in bills of review.

It is important, therefore, to ascertain with some exactness the character and effect of this evidence when taken alone; and, also, when viewed in connection with the evidence in the former case.

The bill of review charges, upon information and belief, that Stewart (who was one of the solicitors for the complainant in the original bill) obtained by means of bribery the testimony of Dr. Wood, a material witness in the cause, and upon the faith of whose evidence this court was induced to render its decision on * the appeal; that said Stewart gave to the witness his note [* 568] for the sum of two hundred and eighty dollars; and, that this fact first came to the knowledge of the complainants since the decree.

The answer sets forth, that this note was given by Stewart under the following circumstances: The defendant, on his return to the State of Kentucky, in the fall of 1827, ascertained that his overseer,

Wing, who was his agent in charge of the farm or plantation in question, had greatly involved him in debt, and among the list of creditors furnished by said overseer were Doctors Smith and Wood. That afterwards, when he brought his suit for the redemption of the mortgage, he left with the said Stewart a list of the names by whom he believed he could prove the facts necessary to sustain his bill; and among others were the names of Doctors Wood and Smith. That he was subsequently informed by Stewart that each of these two witnesses claimed a debt against him; and that Wood had exhibited an account certified by said Wing, his overseer, for medical services and borrowed money; and knowing that any account signed by Wing was correct, the defendant authorized his solicitor to execute a note for the same as his agent; and to do the same thing in respect to Dr. Smith, after ascertaining what was really and truly due to him.

That he was afterwards informed by said Stewart, he had executed a note to Doctor Wood to the amount of two hundred and eighty dollars, which included his account together with the interest. That said Stewart also informed him he would have given a similar obligation to Doctor Smith; but on reference to a record of a suit of said Smith against the defendant in Louisville chancery court, it appeared doubtful if any further sum was due to him. Thus the facts stand upon the pleadings.

The proofs in the case, as far as they go, sustain the answer. They consist altogether of admissions drawn from Wood by persons in the service of Southard, the complainant, employed with the express view of extorting them by the temptation of reward, and by the use of the most unscrupulous and unjustifiable means. A deliberate and corrupt conspiracy was formed, at the instance of Southard, for the purpose of obtaining from Wood an admission that this note was given as an inducement to a consideration for his testimony in the original suit; but in the several conversations detailed, and admissions thus insidiously procured, Wood persisted in the assertion that the note was given as a consideration principally for medical services rendered to the slaves of Russell on the plantation in question. If any doubt could exist as to the truth of the circumstances

under which this note was given, as declared by Wood, his [* 569] * consistency in the numerous conversations into which he was decoyed, unconsciously, by the conspirators, should remove it. If not founded in fact, the consistency is strange and unaccountable, considering the character of the persons employed to entrap him, and the unscrupulous and unprincipled appliances used to accomplish a different result, namely, the obtaining an admission

that the note was given as the wages of his former testimony. He was surrounded by professed friends for this purpose, and intoxicating liquors freely used, the more readily to entrap him. An attempt has been made to invalidate this explanation by the testimony of Doctor Smith, who states, that he was the general physician of the plantation, and that, in his opinion, services to the amount claimed by Wood could not have been rendered at the time without his knowledge; but this negative testimony, whatever weight may properly be given to it, is not sufficient to overcome the answer, and corroborating circumstances to which we have referred. It is matter of opinion and conjecture; and that, too, after the lapse of some twenty-five years. Wing, the overseer, who might have cleared up any doubt upon the question, is dead.

One line of proof and of argument, on the part of the complainant in the original suit, to show that the transaction was a mortgage and not a conditional sale, was the great inadequacy of price. A good deal of evidence was furnished on both sides upon this point. The item of newly discovered evidence, besides that already noticed, is the testimony of Hancock, who states that Russell, in a conversation with him in the forepart of the year 1827, as near as he could recollect, offered to sell to him the plantation for the sum of \$5,000. This is claimed to be material, from its bearing upon the question of adequacy of price, Southard having paid nearly this amount.

Without expressing any opinion as to the influence this fact, if produced on the original hearing, might have had, it is sufficient to say, that it does not come within any rule of chancery proceedings as laying a foundation for, much less as evidence in support of, a bill of review.

The rule, as laid down by Chancellor Kent, 3 J. Ch. 124, is, that newly discovered evidence, which goes to impeach the character of witnesses examined in the original suit, or the discovery of cumulative witnesses to a litigated fact, is not sufficient. It must be different, and of a very decided and controlling character. 3 J. J. Marsh. 492; 6 Madd. 127; Story's Eq. Pl. § 413.

The soundness of this rule is too apparent to require argument, for, if otherwise, there would scarcely be an end to litigation in chancery cases, and a temptation would be held out to *tam- [* 570] per with witnesses for the purpose of supplying defects of proof in the original cause.

A distinction has been taken where the newly discovered evidence is in writing, or matter of record. In such case, it is said, a review may be granted, notwithstanding the fact to which the evidence relates may have been in issue before; but otherwise, if the evidence rests in parol proof. 1 Dev. & Batt. 108, 110.

Applying these rules to the case before us, it is quite apparent that the decree below dismissing the bill was right, and should be upheld. The utmost effect that can be claimed for the newly discovered evidence is: 1. The impeachment of the testimony of Doctor Wood in the original suit; and, 2. A cumulative witness upon a collateral question in that suit, which was the inadequacy of the price paid; a fact, it is true, bearing upon the main issue in the former controversy, but somewhat remotely.

As it respects the first—the impeachment of Wood—the means disclosed in the record resorted to by the complainant, Southard, strongly exemplify the soundness of the rule that excludes this sort of evidence as a foundation for a bill of review, and the danger of relaxing it by any nice or refined exceptions. And, as to the second,—the evidence of Hancock—it is excluded on the ground, not only that it is merely cumulative evidence, but relates to a collateral fact in the issue, not of itself, if admitted, by any means decisive or controlling. If newly discovered evidence of this character could lay a foundation for a bill of review, it is manifest that one might be obtained in most of the important and severely litigated cases in courts of chancery.

There is another question involved in this case, not noticed on the argument, but which we deem it proper not to overlook.

As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with.

The better opinion is, that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree.

Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the [* 571] *decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the court of chancery and house of lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits. 1 Vern. 416; 2 Paige, 45; 1 M'Cord's Ch. 22, 29, 30; 3 J. J. Marsh. 492; 1 Hen. & Munf. 13; Mitford's Pl. 88; Cooper's Pl. 92; Story's Eq. Pl. § 408. Neither

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of these prerequisites to the filing of the bill before us have been observed.

We think the decree of the court below, dismissing the bill of review, was right, and ought to be affirmed.

WILLIAM J. SLICER, LAWRENCE SLICER, WILLIAM CROMWELL SLICER, and MARCELLA SLICER, Minors, by their Father and next Friend, WILLIAM J. SLICER, and MARTHA VIRGINIA BERKLEY, JEREMIAH BERRY, and THOMAS CROMWELL BERRY, Appellants, v. THE BANK OF PITTSBURG.

16 H. 571.

Where an agreement to confess judgment to foreclose a mortgage appeared on file, and a state court, at a subsequent term, granted leave to enter a judgment *nunc pro tunc*, no other court can revise this exercise of discretion.

Twenty years possession under a *de facto* foreclosure of a mortgage, is a bar to redemption, even though the proceedings to foreclose were not regular, unless the mortgagor accounts for the delay, and shows that he has a valid right to redeem.

THE case is stated in the opinion of the court.

T. Fox Alden, and *Johnson*, for the appellants.

Hepburn and *Loomis*, contra.

* M'LEAN, J., delivered the opinion of the court. [* 576]

This is an appeal from the decree of the circuit court, for the western district of Pennsylvania.

The complainants represented in their bill that their ancestor, Thomas Cromwell, was seised of a tract of land, containing one hundred and seventy acres, situate in the county of Alleghany, at or nearly adjoining the city of Alleghany, and also a certain lot of land situate in the city of Pittsburg, which were mortgaged by the said Cromwell to secure a debt of twenty-one thousand dollars which he owed to the Bank of Pittsburg. That the bank, on the 9th of June, 1820, caused a writ of *scire facias* to issue on the mortgage in the court of common pleas, which had jurisdiction of the case, a service of which was accepted by the said Cromwell in writing, but that said writ was never legally returned. That without any judgment on the mortgage, a writ of *levari facias* was issued, and the lands mortgaged were levied on and sold, and the bank became the purchaser.

That on the 1st of December, 1835, the bank, by its attorney, Bradford, moved the court for a rule on Thomas Cromwell, the defendant, to show cause on the second Monday of December, why the

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record of the case should not be amended on the docket, so that the judgment, which appears among the papers, should be entered as of September 13, 1820. The rule was granted, and on the 14th of December, 1835, the same was made absolute, and judgment, *nunc pro tunc*, entered in favor of the bank by the prothonotary of the court.

[* 577] * And on the 16th of March, 1836, the said Bradford moved that the *scire facias*, which had been issued should be amended, by inserting the 13th of September, 1820, instead of the 13th of May of the same year, so as to conform to the judgment, and the motion was granted and the amendment made.

The judgment entered on the papers was as follows: The Bank of Pittsburg *scire facias*. "In my proper person, I this day appeared before the prothonotary in his office, and confessed judgment to the plaintiff for \$21,740.40, besides costs, with release of all errors without stay of execution, and that the plaintiff shall have execution by *levari facias* to November term, 1820:" signed, Thomas Cromwell—which paper the clerk states was filed September 13, 1820. This paper is alleged to be in the handwriting of the attorney, but the signature is admitted to be Cromwell's.

This authority, it is alleged, did not authorize the entry of a judgment, and that it was no part of the record, and cannot show the judgment, it being no more than parol proof; which cannot be received to establish a judgment, unless it be shown that the book containing the original entry had been lost.

The bank is alleged to have been in possession, by itself and tenants, of the property sold; and that there being no judgment, the proceedings on the *scire facias* are void, and that in equity the bank should only be considered as a mortgagee and compelled to account for the rents and profits, and be decreed to release the mortgage on receiving the money and interest on the debt due to the bank as aforesaid.

The complainants are shown to be the heirs of Thomas Cromwell.

The bank, in its answer, admits the facts as set forth in the bill as to the debt, the mortgage, the issuing of the *scire facias*, the judgment, and the sale of the premises, &c., and alleges their validity, under the laws of Pennsylvania. That the mortgage having been produced and the property sold, which, before the year 1829, was sold, and conveyed by the bank to different individuals, and that it has ever since been in the hands of innocent purchasers; and it alleges there is no right of redemption under the circumstances, and it prays that the bill may be dismissed at the cost of the complainants.

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From the proceedings in this case it appears, that the records of the court, where the proceedings on the mortgage were had, are kept loosely, and differently from the judicial records of the courts of common law in England or in this country. But the usage must constitute the law, under such circumstances, as a requirement of the forms observed elsewhere, would affect titles under judicial sales to a ruinous extent.

*By the judiciary act of Pennsylvania, of the 13th of [* 578] April, 1791, it is provided that prothonotaries shall have the power to sign all judgments, writs, or process, &c., as they had for those purposes when they were justices of the court. Before this statute it appears that one of the justices of the court, having possession of the seal, signed all writs and judgments, took bail, &c., and performed the duties of prothonotary. And under the above statute, the prothonotary still exercises many judicial functions.

The confession of judgment with release of errors, and the agreement that execution should issue returnable to November term ensuing, evinced a desire on the part of the mortgagor, to remove every obstruction to a speedy recovery of the demand by the bank. The *scire facias* was returned to August term, 1820. This mode of procedure on a mortgage was authorized by a statute, and was intended as a substitute for a bill in chancery, there being no such court in Pennsylvania.

The objection to this judgment is, that it was not entered upon the minutes kept by the prothonotary. It is in proof that these minutes or dockets were not carefully preserved by the prothonotary, and that the one in which this entry should have been made, is lost, but there is no positive proof that any such entry was made.

The prothonotary took the confession of the judgment in writing, and there can be no doubt he had power to do so. By the practice of the common pleas, it seems the judgment is entered sometimes on the declaration, at others on a paper filed in the cause. From the entry of judgment the prothonotary is enabled to make out the record in form when called for, but, unless required, the proceedings are never made out at length. For this purpose it would seem that the paper filed, containing the confession of a judgment by the defendant, would afford more certainty than the abbreviated manner in which it was usually entered.

In *Reed v. Hamet*, 4 Watts, 441, the court say that judgments by confession, on the appearance of the party in the office, taken by the prothonotary, though not universal, have, from time immemorial, been frequent, and their validity has never been questioned.

Confession of judgment is a part of the record when made out,

and it may be copied from the papers in the case. *Cook v. Gilbert*, 8 Serg. & R. 568; *McCalmont v. Peters*, 13 Serg. & R. 196; *Lewis v. Smith*, 2 Serg. and R. 142; *Shaw v. Boyd*, 12 Pa. State, 216; 7 Serg. & R. 306.

The docket being lost, under the circumstances the court would, if necessary, presume the entry of the judgment was [* 579] *made on it. This presumption would rest upon the fact that judgment was confessed with the release of all errors, and an agreement that execution should issue by the mortgagor, which execution did issue and on which the land was sold, shortly after which the mortgagor surrendered the possession; and an acquiescence by him and his heirs for thirty years, would afford ample ground to presume that the prothonotary had performed the clerical duty of entering the judgment on the docket.

But the court had the power to make the amendment, which they did make, and which removed the objection, by causing the judgment to be entered *nunc pro tunc*. This was a duty discharged by the court, in the exercise of a discretion, which no court can revise. *Clymer v. Thomas*, 7 Serg. & R. 178, 180; *Chirac v. Reimcker*, 11 Wheat. 302; *Latshaw v. Steinman*, 11 Serg. & R. 357-8; *Walden v. Craig*, 9 Wheat. 576.

If there had been no judgment, under the circumstances, the complainants could have no right to redeem the premises.

The complainants file their bill to redeem the land, as mortgagors, which, by the improvements and the general increase of the value of real estate where the property is situated, has become of great value. Thirty years have elapsed since it was sold, under the appearance, at least, of judicial authority. The property was purchased by the bank for less than the amount of the debt. By the confession of judgment, with a release of all errors, and an agreement that execution should be issued, the mortgagor did all he could to facilitate the proceedings and to secure a speedy sale of the premises. The bank, it seems, in the course of some six or nine years, sold the property in lots to different purchasers, for something more, perhaps, than its original debt and interest. For nearly twenty-five years the purchasers have been in possession of the property, improving it and enjoying it as their own.

No dissatisfaction was expressed by the mortgagor, who voluntarily relinquished the possession, and none appears to have been expressed by his heirs, until the commencement of this suit. For thirty years the mortgagee and its grantees have been in possession of the property, no claim of right being set up for the equity of redemption, or on any other account. Under such circumstances a court of equity could give no relief had there been no legal judgment.

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“ Twenty years undisturbed possession, without any admission of holding under the mortgage, or treating it as a mortgage during that period, is a bar to a bill to redeem. But if within that period there be any account, or solemn acknowledgment of the mortgage as subsisting, it is otherwise. *Dexter v. Arnold*, 1 Sumn. C. C. 109.

* A mortgagor cannot redeem after a lapse of twenty [* 580] years, after forfeiture and possession, no interest having been paid in the mean time, and no circumstances appearing to account for the neglect. *Hughes v. Edwards*, 9 Wheat. 489. Where the mortgagee brings his bill of foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged unless there be circumstances to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. *Ibid*.

In every point of view in which the case may be considered, it is clear that there is no ground of equity, on which the complainants can have relief.

The decree of the circuit court is affirmed, with costs.

1 B. 488.

CHARLES B. CALVERT and GEORGE H. CALVERT, Plaintiffs in Error, v. JOSEPH H. BRADLEY and BENJAMIN F. MIDDLETON.

16 H. 580.

A covenant with several lessors, to keep the demised premises in repair, is joint, though the lease sets out the proportions in which the lessors own, and reserves the rent to them, severally, in those proportions.

The question, whether a mortgagee of a leasehold interest is liable, on the covenants in the lease, as an assignee, considered.

ERROR to the circuit court for the District of Columbia. The case is stated in the opinion of the court.

Wylie, for the plaintiffs.

Bradley and Lawrence, contra.

* DANIEL, J., delivered the opinion of the court. [* 590]

The plaintiffs brought their action of covenant, in the court above mentioned, against the defendants, to recover of them in damages, the value of repairs made by the plaintiffs upon certain property in the city of Washington, known as the National Hotel, which had been on the 17th of April, 1844, leased by the plaintiffs, together with Roger C. Weightman, Philip Otterback, William A. Bradley, and Robert Wallach, to Samuel S. Coleman, for the term of five years.

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This property was owned by the lessors in shares varying in number as to the several owners, and by the covenant in the deed of demise; the rent was reserved and made payable to the owners severally in proportion to their respective interests, the interests of the plaintiffs only in the shares owned by them being joint. In addition to the covenant on the part of the lessee for payment to each of the lessors of his separate proportion of the rent, there is a covenant by the lessee for the payment of the taxes and assessments which might become due upon the premises during the term, and a further covenant that he would, during the same time, "keep the said hotel with the messuages and appurtenances in like good order and condition as when he received the same, and would, at the expiration of the said term, surrender them in like good repair." On the 1st of January, [*591] 1847, the lessee, Coleman, * assigned all his interest in the lease to Cornelius W. Blackwell, who entered and took possession of the premises. On the 17th of February, 1848, Blackwell, by deed poll, conveyed to the defendants, Bradley and Middleton, all the goods, chattels, household stuffs, and furniture then upon the premises, together with the good will of the said hotel and business, and the rest and residue of the unexpired term and lease of said Blackwell in the premises—upon trust to permit the said Blackwell to remain in possession and enjoyment of the property until he should fail to pay and satisfy certain notes and responsibilities specified in the instrument; but upon the failure of Blackwell to pay and satisfy those notes and responsibilities, the trustees were to take possession of the property conveyed to them, and to make sale thereof at public auction for the purposes in the deed specified. Blackwell remained in possession after the execution of the deed to the defendants, until the 6th of March, 1849, when he absconded, leaving a portion of the rent of the premises in arrear. The property having been thus abandoned by the tenant, an agreement was entered into between the owners of the property and the defendants, that a distress should not be levied for the rent in arrear, but that the defendants should sell the effects of Blackwell left upon the premises, and from the proceeds thereof should pay the rent up to the 1st day of May, 1849, — the defendants refusing to claim or accept any title to, or interest in, the unexpired portion of the lease, or to take possession of the demised premises. In this state of things the plaintiffs, being the largest shareholders in those premises, proceeded to take possession of and to occupy them, and to put upon them such repairs as by them were deemed necessary, and have continued to hold and occupy them up to the institution of this suit. The action was brought by the plaintiffs alone, and in their own names, to recover their proportion of the

damages alleged by them to have been incurred by the breach of the covenant for repairs contained in the lease to Coleman, which was assigned to Blackwell, and by the latter to the defendants by the deed-poll of February 17, 1848.

To the declaration of the plaintiffs the defendants pleaded four separate pleas. To the 3d and 4th of these pleas the defendants demurred, and as it was upon the questions of law raised by the demurrer to these pleas, that the judgment of the court was given, we deem it unnecessary to take notice of those on which issues of fact were taken. The 3d and 4th pleas present substantially the averments that the deed from Blackwell to the defendants was simply and properly a deed of trust made for the security of certain debts and liabilities of Blackwell, therein enumerated; and giving power to the defendants in the event of the failure on the part of Black- [* 592] well to pay and satisfy those responsibilities, to take possession of the subjects of the trust and dispose of them for the purposes of the deed. That this deed was not in law a full assignment of the term of Blackwell in the demised premises, and never was accepted as such, but on the contrary was always refused by the defendants as such; and that the plaintiffs, by their own acts, would have rendered an acceptance and occupation by the defendants, as assignees of the term, impracticable, if such had been their wish and intention, inasmuch as the plaintiffs themselves had, upon the absconding of Blackwell, the assignee of Coleman, entered upon and occupied the demised premises, and held and occupied the same up to the institution of this action, and had, during that occupancy, and of their own will, made such repairs upon the premises as to the plaintiffs has seemed proper or convenient.

Upon the pleadings in this cause two questions are presented for consideration; and comprising, as they do, the entire law of the case, its decision depends necessarily upon the answer to be given to those questions.

The first is, whether the plaintiffs in error, as parties to the deed of covenant on which they have declared, can maintain their action without joining with them as co-plaintiffs the other covenantees?

The second is, whether the defendants in error, in virtue of the legal effect and operation of the deed to them from Blackwell, the assignee of Coleman, and without having entered upon the premises in that deed mentioned, except in the mode and for the purposes in the 3d and 4th pleas of the defendants set forth, and admitted by the demurrer, were bound for the fulfilment of all the covenants in the lease to Coleman, as regular assignees would have been?

The affirmative of both these questions is insisted upon by the plaintiffs.

The converse as to both is asserted by the defendants, who contend as to the first, that the covenants for repairs declared on and of which profert is made, is essentially a joint contract, by and with all the covenantees, and could not be sued upon by them severally; and that the demurrer to the 3d and 4th pleas, reaching back to and affecting the first vice in the pleadings, shows upon the face of the declaration, and of the instrument set out *in hæc verba*, a restriction upon the plaintiffs to a joint interest, or a joint cause of action only with all their associates in the lease.

2. That the deed from Blackwell to the defendants, being a conveyance of a leasehold interest in the nature of a trust for the [*593] security of a debt, by the terms of which conveyance *the grantor was to remain in possession till default of payment, and the grantees not having entered into possession of the demised premises, which were entered upon and held by the plaintiffs themselves, the defendants could not be bound, under the covenant for repairs, to the premises never in their possession, and over which they exercised no control.

The second of the questions above mentioned, as presented by the pleadings, will be first adverted to. This question involves the much controverted and variously decided doctrine as to the responsibility of the mortgagee of leasehold property, pledged as security for a debt, but of which the mortgagee has never had possession, for the performance of all the covenants to the fulfilment whereof a regular assignee of the lease would be bound.

With regard to the law of England, as now settled, there seems to be no room for doubt that the assignee of a term although by way of mortgage or as a security for the payment of money, would be liable under all the covenants of the original lessee. In the case of *Eaton v. Jacques*, reported in the 2d vol. of Douglas, p. 455, this subject was treated by Lord Mansfield with his characteristic clearness and force; and with the strong support of Justices Willes, Ashurst, and Buller, he decided that the assignee of a lease by way of mortgage or as a mere security for money, and who had not possession, is not bound for or by the covenants of the lessee. The language of his lordship in this case is exceedingly clear. "In leases," said he, "the lessee, being a party to the original contract, continues always liable notwithstanding any assignment; the assignee is only liable in respect of his possession of the thing. He bears the burden while he enjoys the benefit, and no longer; and if the whole is not passed, if a day only is reserved, he is not liable. To do justice, it is necessary to understand things as they really are, and construe instruments according to the intent of the parties. What is the effect of this instru-

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ment between the parties? The lessor is a stranger to it. He shall not be injured, but he is not entitled to any benefit under it. Can we shut our eyes and say, it is an absolute conveyance? It was a mere security, and it was not, nor ever is meant that possession shall be taken until the default of payment and the money has been demanded. The legal forfeiture has only accrued six months, and if the mortgagee had wanted possession he could not have entered *via facti*. He must have brought an ejectment. This was the understanding of the parties, and is not contrary to any rule of law." The same doctrine was sanctioned in the case of *Walker v. Reeves*, to be found in a note in *Douglas*, vol. 2, p. 461. But by the more recent case of *Williams v. Bosanquet*, 3 Moo. J. B. 500, it has been decided that when a party takes an assignment of a lease by [* 594] way of mortgage as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for the payment of the rent, though he never occupied or became possessed in fact. This decision of *Williams v. Bosanquet* is founded on the interpretation put upon the language of Littleton in the fifty-ninth and sixty-sixth sections of the *Treatise on Tenures* — in the former of which that writer remarks: "That it is to be understood that in a lease for years by deed or without deed, there needs no livery of seisin to be made to the lessee, but he may enter when he will, by force of the same lease;" and in the latter; "also, if a man letteth land to another for term of years, albeit the lessor dieth before the lessee entereth into the tenements, yet he may enter into the same after the death of the lessor, because the lessee, by force of the lease, hath right presently to have the tenements according to the force of the lease." And the reason, says Lord Coke, in his commentary upon these sections is, "because the interest of the term doth pass and rest in the lessee before entry, and therefore the death of the lessor cannot divest that which was vested before." True it is, he says, "that to many purposes he is not tenant for years until he enter, as a release to him is not good to increase his estate before entry." Co. Litt. 46, b. Again it is said, by this commentator, that, "a release which enures by way of enlarging an estate cannot work without possession; but by this is not to be understood that the lessee hath but a naked right, for then he could not grant it over; but seeing he hath *interesse termini* before entry, he may grant it over, albeit for want of actual possession he is not capable of a release to enlarge his estate." Whatever these positions and the qualifications accompanying them, may by different minds be thought to import, it is manifest, from the reasoning and the references of the court in the case of *Williams v. Bosanquet*, that from them have been deduced the doctrine ruled in

that case, and which must be regarded as the settled law of the English courts, with respect to the liabilities of assignees of leasehold estates. But clearly as this doctrine may have been established in England, it is very far from having received the uniform sanction of the several courts of this country, nor are we aware that it has been announced as the settled law by this court. Professor Greenleaf, in his edition of Cruise, Title 15, Mortgage, §§ 15, 16, p. 111, inclines very decidedly to the doctrine in *Eaton v. Jacques*, Doug. 455. After citing the cases of *Jackson v. Willard*, 4 Johns. 41 ; of *White v. Bond*, 16 Mass. 400 ; *Waters v. Stewart*, 1 Caines's Cases, 47 ; *Cushing v. Hurd*, 4 Pick. 253, ruling the doctrine that a mortgagee out of possession has no interest which can be sold under execution, but [*595] that the equity of *redemption remaining in the mortgagor is real estate, which may be extended or sold for his debts ; and further, that the mortgagee derives no profit from the land until actual entry or other exertion of exclusive ownership, previous to which the mortgagor takes the rents and profits without liability to account, Mr. Greenleaf comes to the following conclusion, namely : " On these grounds it has been held here as the better opinion, that the mortgagee of a term of years, who has not taken possession, has not all the legal right, title, and interest of the mortgagor, and therefore is not to be treated as a complete assignee so as to be chargeable on the real covenants of the assignor."

In the case of *Astor v. Hoyt*, reported in the 5th of Wendell, 603, decided after the case of *Williams v. Bosanquet*, and in which the latter case was considered and commented upon, the supreme court of New York, upon the principle that the mortgagor is the owner of the property mortgaged against all the world, subject only to the lien of the mortgagee, declare the law to be, " that a mortgagee of a term not in possession, cannot be considered as an assignee, but if he takes possession of the mortgaged premises he has the estate, *cum onere*. In the case of *Walton v. Cronly's Administrator*, in the 14th of Wendell, 63, upon the same interpretation of the rights of the mortgagor which was given in the former case, it was ruled that a mortgagee who has not taken possession of the demised premises, is not liable for rent, and that the law in this respect is in New York different from what it is in England. It is contended, on behalf of the plaintiff in error, that the doctrine in *Eaton v. Jacques*, and in the several decisions from the state courts in conformity therewith, is inconsistent with that laid down by this court in the cases of *Stelle v. Carroll*, in the 12th of Peters, 201, and of *Van Ness v. Hyatt et al.* in the 13th of Peters, 294. With regard to this position, it may be remarked that the questions brought directly to the view of the court,

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and regularly and necessarily passed upon in these cases, did not relate to the rights and responsibilities of the assignee of a term, or to what it was requisite should be done for the completion of the one or the other. Giving every just latitude to these decisions, all that can be said to have been ruled by the former is, that by the common law a wife is not dowable of an equity of redemption, and by the latter, that an equitable interest cannot be levied upon by an execution at law. This court, therefore, cannot properly be understood as having, in the cases of *Stelle v. Carroll*, and *Van Ness v. Hyatt*, established any principle which is conclusive upon the grounds of defence set up by the third and fourth pleas of the defendants. Nor do we feel called upon, in the present case, to settle that principle; for let it be supposed that such a principle has been most explicitly ruled by this court, still, that sup- [* 596] position leaves open the inquiry, how far the establishment of such a principle can avail the plaintiffs in the relation in which they stand to the other covenantees in the deed from Coleman. In other words, whether the covenant for repairs, contained in that deed, was not essentially a joint covenant; one in which the interest was joint as to all the grantees, and with respect to which, therefore, no one of them, or other portion less than the whole, could maintain an action?

The doctrines upon the subjects of joint and several interests under a deed, and of the necessity or propriety for conformity with remedies for enforcing those interests to the nature of the interests themselves, have been maintained by a course of decision as unbroken and perspicuous, perhaps, as those upon which any other rule or principle can be shown to rest. They will be found to be the doctrines of reason and common sense.

Beginning with *Windham's case*, 3d Reports, part 5, 7 a, 7 b, it is said that joint words will be taken respectively and severally, 1. With respect to the several interests of the grantors. 2. In respect of the several interests of the grantees. 3. In respect to, that the grant cannot take effect but at several times. 4. In respect to the incapacity and impossibility of the grantees to take jointly. 5. In respect of the cause of the grant or *ratione subjectæ materiæ*. The next case which we will notice, is *Slingsby's case*, in the same volume, 18 a, 18 b, decided in the exchequer. In this case it was ruled that a covenant with several *et cum quolibet* and *qualibet eorum*, is a several covenant only where there are several interests. Where the interest is joint, the words *cum quolibet et qualibet eorum* are void, and the covenant is joint. In the case of *Eccleston and Wife v. Clipsham*, the law is stated, that although a covenant be joint and several in the terms of

it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees. And on the other hand, if the interest and cause of action be several, the action may be brought by one only. 1 Saunders, 153. The learned annotator upon Sir Edmund Saunders, in his note to the case of *Eccleston v. Clipsham*, has collected a number of cases to this point and others, which go to show that where there are several joint covenantees, and one of them shall sue alone without averring that the others are dead, the defendant may take advantage of the variance at the trial, and that the principle applicable to such a case is different from that which prevails where the action is brought against one of several joint covenantors or obligors who can avail themselves of the irregularity by plea in abatement only. The same rule with regard to the construction of covenants and to the legal rights and position of the parties thereto in courts of law, may be seen in the cases of *Anderson v. Martindale*, 1 East, 497; *Withers v. Bircham*, 3 Barn. & Cress. 255; *James v. Emery*, 5 Price, 533.

It remains now to be ascertained how far the parties to the case before us come within the influence of principles so clearly defined, and so uniformly maintained in the construction of covenants and in settling the legal consequences flowing from that interpretation. The instrument on which the plaintiffs instituted their suit was a lease from the plaintiffs and various other persons interested in different proportions in the property demised, and by the terms of which lease rent was reserved and made payable to the several owners of the premises in the proportion of their respective interests. So far as the reservation and payment of rent to the covenantees, according to their several interests, made a part of the lease, the contract was several, and each of the covenantees could sue separately for his portion of the rent expressly reserved to him. But in this same lease there is a covenant between the proprietors and the lessee, that the latter shall keep the premises in good and tenantable repair, and shall return the same to those proprietors in the like condition; and it is upon this covenant or for the breach thereof that the action of the plaintiffs has been brought. Is this a joint or several covenant? It has been contended that it is not joint, because its stipulations are with the several covenantees jointly and severally. But the answer to this position is this: Are not all the covenantees interested in the preservation of the property demised, and is any one or a greater portion of them exclusively and separately interested in its preservation? And would not the dilapidation or destruction of that property inevitably affect and impair the interests of all, however it might and necessarily would so affect them in unequal amounts?

It would seem difficult to imagine a condition of parties from which an instance of joint interests could stand out in more prominent relief. This conclusion, so obvious upon the authority of reason, is sustained by express adjudications upon covenants essentially the same with that on which the plaintiffs in this case have sued.

The case of *Foley v. Addenbrooke*, 4 Adolph. & Ell. (N. S.) 197. The declaration in covenant stated, that Foley and Whitby had demised to Addenbrooke lands and iron mines of one undivided moiety, of which Foley was seised in fee, Addenbrooke covenanting with Foley and Whitby and their heirs to erect and work furnaces and to repair the premises and work the mines; that Foley was dead, and plaintiff, Foley's heir, and breaches were assigned as committed since the death of Foley; that * Addenbrooke, and [* 598] since his death his executors, had not worked the mines effectually, nor repaired the premises, nor left them in repair. To this declaration it was pleaded, that Whitby, one of the tenants in common, and one of the covenantees, who was not joined in the action, still survived. This plea was sustained upon special demurrer, and Lord Denman, in delivering the opinion of the court, says: "In the present case the covenants for breach, of which the action is brought, are such as to give to the covenantees a joint interest in the performance of them; and the terms of the indenture are such that it seems clear that the covenantees might have maintained a joint action for the breach of any of them. Upon this point the case of *Kitchen v. Buckley*, 1 Lev. 109, is a clear authority; and the case of *Petrie v. Bury*, 3 Barn. & Cress. 353, shows that if the covenantees could sue jointly, they are bound to do so."

The case of *Bradburne v. Botfield*, in the exchequer, reported in the 14th of Meeson & Welsby, 559, was an action of covenant upon a lease by seven different lessors jointly, according to their several rights and interests in certain coal mines, to the defendant, yielding and paying certain rents to the lessors respectively, and to their respective heirs and assigns, according to their several and respective estates, rights, and interests in the premises; and the defendant covenanted with all the above parties and with each and every of them, their and each and every of their heirs, executors, administrators, and assigns, to repair the premises, and to surrender them in good repair to the lessors, their heirs and assigns respectively at the end of the term. The declaration then deduced to the plaintiff a title to the moiety of one of the lessors, and alleged as breaches the non-repair of the premises and the improper working of the mines. To this declaration it was pleaded, that one of the original lessors, who had survived all the other covenantees, was still living. It was held, upon

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demurrer, that the covenants for repairs and for working the mines were in their nature joint and not several, and that the surviving covenantee ought to have brought the action. Baron Parke, who delivered the opinion of the court, thus speaks: "We have looked, since the argument, into the lease now set out on oyer, and into all the authorities cited for the plaintiff, and are still of opinion that he cannot recover upon the covenants stated in the declaration. It is impossible to strike out the name of any covenantee, and all the covenantees must, therefore, necessarily sue upon some covenant; and there appear to us to be no covenants in the lease which are of a joint nature, if those declared upon are not, or which would be in gross, if the persons entitled to the legal estate had alone demised; for all relate to and affect the quality of the subject of the demise, or to the mode of enjoying of it."

[*599] * We regard the cases just cited as directly in point, and as conclusive against the claim of the plaintiffs to maintain an action upon the covenant for repairs in the lease to Coleman, apart from and independently of the other covenantees in that lease jointly and inseparably interested in that covenant with the plaintiffs. We therefore approve the judgment of the circuit court, that the plaintiffs take nothing by their writ and declaration, but that the defendants recover against them their costs about their defence sustained, as by the said court was adjudged; and we order the said judgment of the circuit court to be affirmed.

SAMUEL H. EARLY, Plaintiff in Error, v. JOHN ROGERS, JUNIOR, and JOSEPH ROGERS, Survivors, &c. of ROGERS AND BROTHERS, Defendants.

16 H. 599.

Construction of an agreement to accept satisfaction of a judgment, held to be conditional, and as it was not performed, the right to an execution revived.

Whether a court will quash an execution, on account of proceedings against the debtor as the garnishee of the creditor, is a question appealing to the discretion of the court below, and a court of errors cannot revise its decision thereon.

ERROR to the district court of the United States for the western district of Virginia. The case is stated in the opinion of the court.

Mason, for the plaintiff.

Chase, contra.

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*CAMPBELL, J., delivered the opinion of the court. [* 607]

The defendants, (Rogers and Co.) on the 27th of May, 1852, recovered in this court against the plaintiff a judgment, in the following words:—

“ In order to put an end to the litigation between the above parties, and as a compromise of the matters in difference between them, that said Samuel H. Early shall pay to the said John Rogers and Joseph Rogers, between this and the first day of September next, the sum of \$10,000, which sum of \$10,000 the said John Rogers and Joseph Rogers agree to receive of the said Samuel H. Early, in full satisfaction and discharge of the original judgment entered against the said Early for the sum of about \$12,500, in said district court of the United States, for the western district of Virginia, and in full satisfaction and discharge of all claims and demands which said John Rogers and Joseph Rogers held against said Early in any account arising out of the dealings on which said litigation is founded.

“ And it is further agreed, that the original judgment rendered in said district court of the United States for the western district * of Virginia, and which is taken up to the supreme [* 608] court of the United States on a writ of error, which is now pending in that court, may be entered affirmed in said supreme court at its present session, subject to the above agreement; that is, the judgment, although affirmed, shall not be obligatory for more than the above sum of \$10,000, to be paid as aforesaid; and as soon as that sum is paid, the said judgment shall be entered satisfied, provided the amount is paid on or before the said first day of September next. Costs to be paid by Early.

“ May 18, 1852.

SAMUEL H. EARLY,
By CHARLES FOX, his attorney.
JOHN ROGERS,
JOSEPH ROGERS,
By JAMES F. MELINE, their attorney.

“ On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs, in conformity to the preceding stipulations; and that the said plaintiffs recover against the said defendant, Samuel H. Early, \$129.52 for their costs herein expended, and have execution therefor.

“ May 27, —.”

The mandate of this court was issued in October, 1852, and spread upon the records of the district court for the western district of Vir-

ginia. In January, 1853, an execution issued returnable to the March rules of that year. At the April term of that court, the plaintiff, Early, obtained a rule against Rogers and Co., requiring them to show cause why the execution so sued out should not be quashed, and also why execution on the said judgment of the said supreme court should not be limited to the sum of \$10,000, with interest thereon, from the first day of September, 1852, and the costs; and also why the same shall not be stayed until the further order of the court, on account of certain attachments and suggestions. Whereupon the court ordered the execution to be quashed, but that the said Rogers and Co. be allowed to sue out their execution against said Early for the principal sum of \$12,115, with costs, but without interest or damages.

The writ of error has been taken to bring this order awarding the execution to this court. We think the district judge interpreted the agreement of the parties and the judgment of this court upon it, correctly. The parties made the reduction of the judgment to \$10,000, dependent upon a condition, * which has not been fulfilled. The plaintiff in error had obliged himself to comply with this condition, or to lose his claim for a deduction. We think the award of execution, for the amount contained in the order, was proper.

The motion to stay the execution, founded upon the fact that creditors of Rogers and Co. had attached this debt, by service of garnishment on the plaintiff in the state courts, was addressed to the legal discretion of the district court, and its judgment is not revisable by this court.

The mere levy of an attachment upon an existing debt, by a creditor, does not authorize the garnishee to claim an exemption from the pursuit of his creditor. The attachment acts make no such provision for his benefit. It is the duty of the court wherein the suit against the garnishee by his creditor may be pending, upon a proper representation of the facts, to take measures that no injustice shall grow out of the double vexation. The court should ascertain if the attachment is prosecuted for a *bonâ fide* debt, without collusion with the debtor, for an amount corresponding to the debt, that no mischief to the security of the debt will follow from a delay, and such other facts as may be necessary for the protection and security of the creditor. An order of the court to suspend, or to delay the creditor's suit, or his execution in whole or for a part, could be then made upon such conditions as would do no wrong to any one.

It is apparent that such inquiries are proper only for the court of original jurisdiction, in the exercise of the equity powers over pro-

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ceedings and suitors before it, with the view to fulfil its great duty of administering justice in every case. We do not perceive in this record evidence that the district judge has exercised his discretion unwisely.

We do not express any opinion upon the questions whether a writ of error was the proper remedy to bring this order before us, nor whether attachments could be levied from the state court upon a judgment or claim in the course of collection in the courts of the United States. Accepting the case as it has been made by the parties, and has been argued at the bar, our conclusion is, there is no error in the record, and the judgment is affirmed.

20 H. 555.

WILLIAM EARLY, Plaintiff in Error, v. JOHN DOE, on the demise of
RHODA E. HOMANS.

16 H. 610.

Under the act of May 26, 1824, § 2, (4 Stats. at Large, 75,) notice of a tax sale "once in each week for twelve successive weeks," is not given, unless the first notice preceded the sale eighty-four days.

ERROR to the circuit court for the District of Columbia. The case is stated in the opinion of the court.

Lawrence, for the plaintiff.

Redin and Woodward, contra.

* WAYNE, J., delivered the opinion of the court. [* 615]

This is an ejectment suit for part of lot No. 4, in square No. 730, in the city of Washington.

The only question raised by counsel in the argument of the case here, is, whether, where property has been assessed for taxes, it can be considered as having been regularly advertised and
* regularly sold, if it shall be sold before twelve full weeks [* 616] (or eighty-four days) have passed from the date of the first advertisement. Eighty-four days advertisement were not given when the property in dispute in this case was sold. Upon the trial in the circuit court, the plaintiff in that court prayed its instruction to the jury in these words: "That the said sale was invalid and of no effect, and passed no title to the defendant in the premises in question; because a period of twelve full weeks had not intervened between the 26th of August, the time of the first advertised notice of sale, and the 15th of November, 1848, the day or time of sale, but a period of eleven weeks and four days only." The court gave the

instruction accordingly. The defendant's counsel excepted to the same. The court, upon his prayer, allowed it, and the case is regularly here by writ of error.

It appears that the notice for sale of the property in dispute was inserted in the National Intelligencer twelve times in successive weeks, the first insertion being on Saturday, the 26th of August, and the last on the 15th of November, the day of sale. Including the 26th of August as one of the days of the notice, and the 15th of November, necessarily as another, we find that the notice was given only for eighty-two days. The language of the statute regulating the notice to be given is in these words: "That public notice of the time and place of the sale of all real property for taxes due the corporation of the city of Washington, shall be given hereafter, by advertisement, inserted in some newspaper published in said city, once in each week, for at least twelve successive weeks." Now, the first week following the date of the advertisement expired with the next Friday, the 10th of November, and, if the computation is carried out, it will be found that the twelfth week expired on the 17th of November. But the sale was made two days before, on the 15th of November, the last insertion of the notice being on the day of sale.

So there were eleven insertions of the notice in the newspaper in different weeks (making, with the first, twelve) after the expiration of the week from the first insertion, and the point to be settled is, whether the statute means that twelve insertions in successive weeks is sufficient notice, without respect to the number of days in twelve weeks. We do not doubt if the statute had been "once in each week for twelve successive weeks," a previous notice of the particular day of sale having been given to the owner of the property, that it might very well be concluded, that twelve notices in different successive weeks, though the last insertion of the notice for sale was on the day of sale, was sufficient. But when the legislator has used the words, for at least twelve successive weeks, we cannot [*617] doubt that the words, at least as they would do in common parlance, mean a duration of the time that there is in twelve successive weeks or eighty-four days. Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. Our construction of the statute under review gives to every word its meaning. The other leaves out of consideration the words "for at least," which mean a space of time comprehended within twelve successive weeks or eighty-four days. The preposition, for, means of itself duration, when it is put in connection with time, and as all of us use it in that way, in our every-day conversation, it cannot be

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presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that any thing may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or as the case may be, that it shall not be done before. The notice for sale, in this instance, was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words "once a week," which precede in this statute those which follow them, "for at least twelve successive weeks." We think that the court did not err in refusing to give to the jury the instruction which was asked by the defendant upon the trial of this case.

The construction of the statute will be recognized to be in harmony with that policy of the law which experience has established to protect the ownerships of property from divestiture by statutory sales, where there has not been a substantial compliance with the law, by which a public officer is empowered to sell it.

Property is liable to be sold on account of an undischarged obligation of the owner of it to the public or to his creditors. But it can only be done in either case where there has been a substantial compliance with the prerequisites of the sale, as those are fixed by law. Any assumption by the officer appointed to make the sale, or disregard of them, the law discountenances. He may not do any thing of himself, and must do all as he is directed by the law under which he acts. He may not, by any misconstruction of it, anticipate the time for sale within which the owner of the property may prevent a sale of it, by paying the demand against him, and the expenses which may have been incurred from his not having done so before. This the law always presumes that the owner may do, until a sale has been made. He may arrest the uplifted hammer of the * auctioneer when the cry for sale is made, if it be done [* 618] before a *bona fide* bid has been made. The authority of the officer to sell is, as it was in this case, "unless the taxes be previously paid to the collector, with such expenses as may have accrued at the time of payment." There is a difference, it is true, in the strictness required in a tax sale, and that of a sale made under judgment and execution, but in both, the same rule applies as to the full notice of time which the law requires to be given for the sale. "In deciding upon tax land titles great strictness has always been observed. The collector's proceedings are closely scanned. The purchaser is bound to inquire whether he has done so or not. He buys at his

peril, and cannot sustain his title without showing the authority of the collector and the regularity of his proceedings."

This court said, in *Williams v. Peyton*, 4 Wheat. 77, that the authority given to a collector to sell land for the non-payment of the direct tax, "is a naked power not coupled with an interest." In all such cases the law requires that every prerequisite to the exercise of that power must precede its exercise, that the agent must pursue the power or his act will not be sustained by it. Again, in *Ronkendorff's* case, 4 Pet. 349, this court repeated that in an *ex parte* proceeding, as a sale of lands for taxes, under a special authority, great strictness is required. An individual cannot be divested of his property against his consent, until every substantial requisite of the law has been complied with. The proof of the regularity of the collector's proceedings devolves upon the person who claims under the collector's sale. At an earlier day, the court decided, in *Stead's Executors v. Course*, 4 Cranch, 403. A collector selling lands for taxes, must act in conformity with the law from which his power is derived; and the purchaser is bound to inquire whether he has so acted. It is incumbent upon the vendee to prove the authority to sell. See also *McClung v. Ross*, 5 Wheat. 116; *Thatcher v. Powell*, 6 Wheat. 119. The decisions made by this court are full as to the circumstances under which tax titles may be set aside. We recommend also the perusal of the case of *Lyon et al. v. Hunt et al.* in 11 Alabama Reports, 295, cited by the counsel for the defendant in error; and to all of the cases cited in the opinion of Chief Justice Collier. It is not necessary for us to extend this opinion further in citing cases upon tax sales. So far as we know, the law upon the subject is the same throughout the United States, and where differences exist they have occurred from a different phraseology in statutes, and not from any discordance in the views of judges in respect to the common law to be applied in tax sales.

See 4 Cranch, 403; 9 *ibid.* 64; 1 Scam. 335; 1 Bibb, [* 619] 295; * 5 Mass. 403; 4 Dev. & Bat. 363; 3 Ohio, 232; 2 *ibid.* 378; 3 Yeates, 284; 2 *ibid.* 100; 13 Sergeant & Rawle, 208; 4 Dev. & Bat. 386; 5 Wheat. 116; 6 *ibid.* 119; 1 Yeates, 300; 3 Monroe, 271; 1 Tyler's Rep. 305; 14 Mass. 177; 8 Wheat. 681; 15 Mass. 144; 1 Greenleaf's Rep. 339; Taylor's North Carolina Rep. 480; 3 Hawks's Rep. 283; 1 Gilm. 26; 10 Wend. 346; 18 Johns. 441; 5 Alabama, 433. I have not the reports of the supreme court of Georgia at hand, to cite from them any cases of tax sales, if any have been decided by it, but I know that the decisions of the courts in that State are the same as those stated in this opinion and in the cases cited.

We affirm the judgment of the circuit court.

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CRUZ CERVANTES, Appellant, v. THE UNITED STATES.

16 H. 619.

The record of the district court for the northern district of California, in a proceeding to confirm a Mexican title, did not show that the land lay in that district. The case was remanded.

APPEAL from the district court of the United States for the northern district of California.

Wm. Carey Jones, for the appellant.

Cushing, (attorney-general,) *contra*.

* M'LEAN, J., delivered the following opinion of the court. [* 621]

It does not appear, from the proceedings before the district court, that the land claimed is within the northern judicial district of California. This is necessary to give that court jurisdiction. It can exercise no power over any claim, where the land lies in the southern judicial district of the same State.

This court has often held, unless the jurisdiction of the circuit or district court appear in the record, the judgment of such court may be reversed on a writ of error. It is therefore important, that, in dealing with land titles, the jurisdiction of the inferior court should appear in the proceeding.

From a map of the State of California, recently published, it appears the land claimed in this case lies in the southern district, and if so, no jurisdiction attached to the court where the proceeding was instituted.

For the purpose of correcting the proceeding in this respect, the decision of the district court is reversed, and the cause is remanded to that court with leave to amend the proceeding in regard to the jurisdiction of the district court, and to any other matter of form or substance which may be necessary.

JOHN C. DESHLER v. GEORGE C. DODGE.

16 H. 622.

To support an action of replevin to recover bank bills, it is not necessary to show that the plaintiffs assignor could have sued, though the title to the bills was conveyed to the plaintiff after they were taken and while they were detained by the defendant.

The 11th section of the judiciary act of 1789, (1 Stats. at Large, 78,) does not apply to an action to recover the note itself, but to an action to recover its contents

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THE case is stated in the opinion of the court.

Stanberry, for the plaintiff.

Spalding and *Pugh*, contra.

[* 630] * NELSON, J., delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Ohio.

The suit below was an action of replevin to recover the possession of a quantity of bank-bills, in the hands of the defendant, upon banks in the city of Cleveland, amounting in the whole to the sum of \$38,592, and the title to which was derived by an assignment from the banks to the plaintiff. The declaration is in the usual form for wrongfully and unjustly detaining the possession of the property, the plaintiff averring that he is a citizen and resident of the State of New York; and the defendant a citizen and resident of the State of Ohio.

To this declaration, the defendant plead to the jurisdiction of the court, setting up that the defendant was acting treasurer of the county of Cuyahoga, Ohio, and had distrained the bills in question belonging to the banks to satisfy the taxes and penalties duly imposed upon them; and that after the said bills had been thus distrained and in his possession, the said banks being incorporated companies by the laws of the State of Ohio, and doing business in the city of Cleveland, sold, assigned, and transferred the same to the plaintiff; and that all the right and title to the said bills belonging to him is derived from the aforesaid assignment; wherefore the defendant says, the supposed causes of action are not within the jurisdiction of the court, and prays judgment if it will take further cognizance of the suit.

To this plea the plaintiff demurred, and the defendant joined in demurrer, upon which judgment in the court below was given for the defendant.

The only question presented in the case by either of the parties is, whether or not the court below had jurisdiction of the case within the true meaning of the 11th section of the judiciary act of 1789, the material part of which is as follows: "Nor shall any
[* 631] * district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." It is admitted the assignors in this case could not have maintained the suit

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in the federal courts. We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a *chose in action* to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned.

In the case of a tortious taking, or wrongful detention of a *chose in action* against the right or title of the assignee, the injury is one to the right of property in the thing, and it is therefore unimportant as it respects the derivation of the title; it is sufficient if it belongs to the party bringing the suit at the time of the injury.

The distinction, as it respects the application of the 11th section of the judiciary act to a suit concerning a *chose in action*, is this — where the suit is brought to enforce the contract, the assignee is disabled unless it might have been brought in the court, if no assignment had been made; but, if brought for a tortious taking or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal chattel.

The principle governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the federal courts, if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not, within this section; but, if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgagee. 7 How. 198. This distinction is stated by Mr. Justice Grier, in the case of *Sheldon et al. v. Sill*, 8 How. 441. The learned justice, in delivering the opinion of the court in that case, observed, “that the term *chose in action* is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confers on one party the right to recover a personal chattel, or sum of money from another, by action.” This paragraph has been relied on *to sustain [* 632] the plea in question; but other portions of this opinion will show, that the phrase “right to recover a personal chattel,” was not meant a recovery in specie, or damages for a tortious injury to the same, but a remedy on the contract for the breach of it, whether the contract was for the payment of money, or the delivery of a personal chattel. Indeed, upon a close examination, this is the fair import of

the language used, as he was speaking of the contract in the instrument assigned, not of the sale or transfer of it.

We have looked simply at the question of jurisdiction in the case, as that is the only question raised by the plea, and as we are satisfied that the demurrer to it is well taken, the judgment of the court below should be reversed, with costs, and proceedings remitted, with directions that judgment be given for the plaintiff that the defendant answer over.

Taney, C. J., Catron, J., Daniel, J., and Campbell, J., dissented.

CATRON, J., dissenting.

The defendant, Dodge, was treasurer and tax-collector of Cuyahoga county in Ohio, for the year 1852. There was assessed on the tax list of that year, against the Bank of Cleveland, \$10,580; against the Merchants Bank of Cleveland, \$7,965; on the Canal Bank of Cleveland, \$9,216; and on the Commercial Bank of Cleveland, \$11,981 — making \$38,981.

These respective amounts were distrained in bank-notes from each bank, and deposited by the tax-collector with the Cleveland Insurance Company, to his credit. As the four banks whose property was distrained were incapable of suing the tax-collector (who was a citizen of Ohio) in the circuit court of the United States, they joined in a written transfer of the bank-notes to John G. Deshler, the plaintiff, a citizen of New York, and he obtained a writ of replevin, and process founded on it, out of the circuit court of the United States, and declared as a citizen of New York. The defendant, Dodge, pleaded in abatement, alleging that the causes of action are not within the jurisdiction of the court; to which plea there was a demurrer.

The first question is, whether this plea in abatement is the proper defence, or should the plea have been in bar.

The plea sets forth the distress for taxes due and unpaid from the banks to the State; that the defendant, Dodge, was the tax-collector, and had the proper authority to make the distress, and did distrain, by virtue of his authority. By the laws of England, replevin [* 633] does not lie for goods taken in execution; nor in *cases where goods are taken by distress according to an act of parliament, this being in the nature of an execution. 7 Bac. Ab. Replevin and Avowry, C. 71; 6 Comyns's Digest, Replevin, D. 218; *Usley v. Stubbs*, 5 Mass. 283, per Parsons, C. J.

So the statute of Ohio, under which the proceeding in this case was had, gives the writ of replevin, and prescribes the mode of proceeding, requiring an affidavit from the owner (or his agent) that the

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goods were his, that they are wrongfully detained by the defendants; "and that said goods and chattels were not taken in the execution, on any judgment against said plaintiff, nor for the payment of any tax, fine, or amercement assessed against the plaintiff;" and it is further provided that any writ of replevin, issued without such affidavit, shall be quashed at the costs of the clerk issuing it; and that he and the plaintiff shall be liable in damages to the party injured. This affidavit Deshler made, and got the property into his possession on giving bond as the law requires.

The plea distinctly shows that the property was in a condition not to be taken by the writ of replevin, and that the circuit court had no jurisdiction to issue the writ, or in anywise interfere with the property by that suit in replevin; and there being no jurisdiction to try title, or proceed further, the plea in abatement was the proper one. And so are the American decisions. *Shaw v. Levy*, 17 Serg. & Rawle, 99.

The next question is, whether these corporations could lawfully assign to a third person their rights of action, to property out of their possession, and held adversely? On common-law principles, such an assignment is champerty. Blackstone says, (vol 4, 135,) champart, in French law, signified a similar division of profits: "In our sense of the word, it signifies the purchasing of a suit, or right of suing; a practice so much abhorred by our law, that it is one main reason why a *chose in action*, or thing of which one hath the right, but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right."

I am not aware that this, as a general rule, has been disputed. It therefore follows, as I think, that the assignment was void, and that the causes of action belonged to the four banks as if it had never been made; and they alone, having the right to sue in any form, and being citizens of Ohio, no power to interfere with the tax-collector, Dodge, or the property distrained, existed in the United States court,

A principal objection that I have heard urged is, that as the plea sets forth matter in bar, and commences and concludes in abatement, it is bad for this reason: If we were allowed to rely on such a barren technicality, the assumption is not well founded. *In [* 634] a replevin for goods the defendant may plead property in another, (or that the goods were taken in execution,) either in abatement or bar. 1 Chit. Pl. 446; *Ilsey v. Stubbs*, 5 Mass. 284-5; 1 Johns. 380; 1 Salk. 5.

As the plaintiff had no title that he could assert, it is of no conse-

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quence to him who has, say some of the authorities ; but if this second ground was doubtful, it is cured by the act of jeofails.

The thirty-second section of the judiciary act declares that no proceeding in civil causes shall be quashed or reversed, for any defect of want of form, but that the courts shall proceed and give judgment according to the right of the cause without regarding such defects, or want of form in any pleading, except in cases of demurrer, where the party demurring shall have specially set down and expressed in his demurrer, the causes thereof. The demurrer here is general, and no mere technicality was allowable.

“The right of the matter in law,” in this case, involves a very grave consideration, such as would, in all probability, deeply disturb the harmony of the Union, if tax payers in larger classes could combine together, let their property be distrained, and then assign it to a third person, a citizen of another State, and on the same day, as in this case, take it from the state authority by a federal court writ, and let it be taken beyond the state’s jurisdiction.

It was said by the supreme court of Pennsylvania, in a case where property had been seized for taxes due, and taken from the officer’s possession by a writ of replevin, “that the court will not support this form of action in such a case, nor suffer such an abuse of their process. If one man may bring replevin where his goods have been taken for taxes, so may every other person ; and thus the collection of all taxes might be evaded. Independently of the act of assembly, we are bound to quash this writ.” *Stiles v. Griffith*, 3 Yeates’s Rep. 82.

I deem the case before us to have been a very disreputable proceeding. The officers of these banks could not make the necessary oath required to obtain a writ of replevin ; and to evade the laws of Ohio, the device of an assignment, of their separate causes of action to a non-resident was resorted to, who could swear that this property was not distrained for his taxes, and thus apparently comply with the law, so far as an oath was required ; whereas he violated its spirit, to bring into a tribunal of the Union a controversy that a state court would not sanction, by practising a fraud on the laws of Ohio, and a fraud on the constitution of the United States. And what adds to the grossness of this transaction is, the attempt to assign and vest in this plaintiff divers causes of action, by separate assignments, thus seeking to practise champerty, in a form and to an extent not heretofore devised. If four could assign, and their claims be combined in one suit, by the assignee, so could as many hundreds. To sanction the validity of an assignment to a non-resident, of property adversely held, and let him sustain a suit for it,

Doe v. Braden. 16 H.

would throw open the United States courts to every matter of litigation where property was in dispute exceeding the value of five hundred dollars.

I feel quite confident that the constitution did not contemplate this mode of acquiring jurisdiction to the courts of the Union, and am of opinion, that the judgment of the circuit court, sustaining the plea, ought to be affirmed.

DANIEL, J. I, also, dissent from the opinion of the court in this case, and concur in the views so conclusively taken of it by my brother Catron.

18 H. 331.

JOHN DOE, on the demise of LOT CLARK, DAVID CLARKSON, JOSEPH D. BEERS, ANDREW TALCOTT, BRANTZ MAYER, and HARRIET HACKLEY, Plaintiff in Error, v. JOSEPH ADDISON BRADEN.

16 H. 635.

The grant of lands in Florida by the king of Spain to the duke of Alagon, whether it takes date from the royal order of December 17, 1817, or from the grant of February 6, 1818, and whether the title was held by him or his assignee, is annulled by the treaty between the United States and the king of Spain, signed February 22, 1819, by virtue of the declaration to that effect, made by the President of the United States, on presenting the treaty for an exchange of ratifications, and assented to by the king in writing, and again ratified by the senate of the United States.

Whether the king of Spain had power thus to annul a grant, is a question, foreclosed, in every judicial tribunal of the United States, by the action of the President and senate, treating with him as having that power.

THE case is stated in the opinion of the court.

Mayer and Johnson, for the plaintiff.

Cushing, (attorney-general,) *contra*.

* TANEY, C. J., delivered the opinion of the court. [*654]

This controversy has arisen out of the treaty¹ with Spain by which Florida was ceded to the United States.

The suit is brought by the plaintiff in error against the defendant to recover certain lands in the State of Florida. It is an action of ejectment. And the plaintiff claims title under a grant from the king of Spain to the duke of Alagon. This is the foundation of his title. And if this grant is null and void by the laws of the United States, the action cannot be maintained.

The treaty in question was negotiated at Washington, by Mr.

¹ 8 Stats. at Large, 252.

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Adams, then secretary of state, and Don Louis De Onis, the Spanish minister. It was signed on the 22d of February, 1819; and by its terms the ratifications were to be exchanged within six months from its date.

It appears, from the treaty, that the negotiations commenced on the 24th of January, 1818, by a proposition from the Spanish government to cede the Floridas to the United States. The grant to the duke of Alagon, bears date February 6, in the same year, and consequently, was made after the king of Spain had authorized his minister to negotiate a treaty for the cession of the territory, and after the negotiation had actually commenced. It embraces ten or twelve millions of acres.

The fact that this grant had been made, came to the knowledge of the secretary pending the negotiation; and he also learned that two other grants,—one to the Count of Puñonrostro, and the other to Don Pedro de Vargas, each containing some millions of acres, had also been made under like circumstances. These three grants covered all, or nearly all, of the public domain in the territory proposed to be ceded. And the secretary naturally and justly considered that grants of this description, made while the negotiation was pending, and without the knowledge or consent of the United States, were acts of bad faith on the part of Spain, and would be highly injurious

to the interests of the United States, if Florida became a [*655] part of *their territory. For the possession and ownership of such vast tracts of country, by three individuals, would be altogether inconsistent with the principles and policy on which this government is founded. It would have greatly retarded its settlement, and diminished its value to the citizens of the United States. For no one could have become a landholder in this new territory without the permission of these individuals, and upon such conditions and at such prices as they might choose to exact.

Acting upon these considerations, the secretary insisted that if the negotiations resulted in a treaty of cession, an article should be inserted by which these three grants, and any others made under similar circumstances, should be annulled by the Spanish government.

The demand was so obviously just, and the conduct of Spain, in this respect, so evidently indefensible, that after much hesitation it was acceded to, and the 8th article introduced into the treaty to accomplish the object. By this article, "all grants made since the 24th of January, 1818, when the first proposal on the part of his Catholic majesty for the cession of the Floridas was made, are thereby declared and agreed to be null and void;" and all grants made before that day, are confirmed.

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With this provision in it, the treaty was submitted to the senate, who advised and consented to its ratification, on the 24th of February, 1819, and it was accordingly ratified by the President.

Before, however, the ratifications were exchanged, the secretary of state was informed that the duke of Alagon intended to rely on a royal order, of December 17, 1817, (which is recited in the grant hereinbefore mentioned,) as sufficient to convey to him the land from that date; and upon that ground claimed that his title was confirmed and not annulled by the treaty.

The secretary, it appears, was satisfied that this royal order conveyed no interest to the duke of Alagon; and that the grant in the sense in which that word is used in the treaty, was not made until the instrument, dated the 6th of February, 1818, was executed.

But as a claim of this character, however unfounded, would cast a cloud upon the proprietary title of the United States, and as claims might also be set up under similar pretexts under the grants to the Count of Puñonrostro and Vargas, the secretary deemed it his duty to place the matter beyond all controversy before the ratifications were exchanged. He therefore requested and received from Don Louis de Onis a written admission that these three grants were understood by both of them to have been annulled by the 8th article of the treaty; and that it was negotiated *and signed [*656] under that mutual understanding between the negotiators.

And having obtained this admission, he notified the Spanish minister that he would present a declaration to that effect, upon the exchange of ratifications, and expect a similar one from the Spanish government to be annexed to the treaty.

But the king of Spain, for a long time, refused to make the declaration required, or to ratify the treaty with the declaration of the American government attached to it. And a great deal of irritating correspondence upon the subject took place between the two governments. Finally, however, the king of Spain ratified it on the 21st of October, 1820, and admitted, in his written ratification annexed to the treaty, in explicit terms, that it was the positive understanding of the negotiators on both sides, when the treaty was signed, that these three grants were thereby annulled; and declared also that they had remained, and did remain, entirely annulled and invalid; and that neither of the three individuals mentioned, nor those who might have title or interest through them, could avail themselves of the grants at any time or in any manner.

With this ratification attached to the treaty, it was again submitted by the President to the senate, who, on the 19th of February, 1821, advised and consented to its ratification. It was ratified, ac-

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cordingly, by the President, and the ratifications exchanged on the 22d of February, 1821. And Florida, on that day, became a part of the territory of the United States, under, and according to, the stipulations of treaty,—the rights of the United States relating back to the day on which it was signed.

We have made this statement, in relation to the negotiations and correspondence between the two governments, for the purpose of showing the circumstances which occasioned the introduction of the 8th article, confirming Spanish grants made before the 24th of January, 1818, and annulling those made afterwards; and also for the purpose of showing how it happened that the three large grants by name were declared to be annulled in the ratification, and not by a stipulation in the body of the treaty. But the statement is in no other respect material. For it is too plain for argument, that where one of the parties to a treaty, at the time of its ratification, annexes a written declaration explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged,—the declaration thus annexed, is a part of the treaty, and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged.

[* 657] * It is not material, therefore, to inquire whether the title of the duke of Alagon takes date from the royal order of December 17, 1817, or from the grant subsequently made on the 6th of February, 1818. In either case the treaty by name declares it to be annulled.

It is said, however, that the king of Spain, by the constitution under which he was then acting and administering the government, had not the power to annul it by treaty or otherwise; that if the power existed anywhere in the Spanish government, it resided in the cortes; and that it does not appear, in the ratification, that it was annulled by that body or by its authority or consent.

But these are political questions, and not judicial. They belong exclusively to the political department of the government.

By the constitution of the United States, the President has the power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur. And he is authorized to appoint ambassadors, other public ministers and consuls, and to receive them from foreign nations; and is thereby enabled to obtain accurate information of the political condition of the nation with which he treats; who exercises over it the powers of sovereignty

and under what limitations; and how far the party who ratifies the treaty is authorized, by its form of government, to bind the nation and persons and things within its territory and dominion, by treaty stipulations. And the constitution declares, that all treaties made under the authority of the United States, shall be the supreme law of the land.

The treaty is, therefore, a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the constitution of the United States. It is their duty to interpret it, and administer it according to its terms. And it would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

In this case, the king of Spain has by the treaty stipulated that the grant to the duke of Alagon, previously made by him, had been and remained annulled, and that neither the duke of Alagon nor any person claiming under him could avail himself of this grant. It was for the President and senate to determine whether the king, by the constitution and laws of Spain, was *author- [*658] ized to make this stipulation, and to ratify a treaty containing it. They have recognized his power by accepting this stipulation as a part of the compact, and ratifying the treaty which contains it. The constituted and legitimate authority of the United States, therefore, has acquired and received this land as public property. In that character it became a part of the United States, and subject to, and governed by their laws. And as the treaty is, by the constitution, the supreme law, and that law declared it public domain when it came to the possession of the United States, the courts of justice are bound so to regard it and treat it, and cannot sanction any title not derived from the United States.

Nor can the plaintiff's claim be supported, unless he can maintain that a court of justice may inquire whether the President and senate were not mistaken as to the authority of the Spanish monarch in this respect; or knowingly sanctioned an act of injustice committed by him upon an individual in violation of the laws of Spain. But it is evident that such a proposition can find no support in the constitution of the United States; nor in the jurisprudence of any country where the judicial and political powers are separated and placed in different hands. Certainly, no judicial tribunal in the United States ever claimed it, or supposed it possessed it.

The plaintiff seems to suppose that he has a stronger title than that of the duke of Alagon. It is alleged that the duke of Alagon, on the 29th of May, 1819, conveyed the greater part of the land granted to him by the king of Spain to Richard S. Hackley, a citizen of the United States. This deed to Hackley was after the signature of the treaty, and before the exchange of ratifications, and the plaintiff claims through Hackley, and contends that this American citizenship protected his title.

But if the deed from the duke of Alagon to a citizen of the United States was valid by the laws of Spain, and vested the Spanish title in Hackley; yet the land in his hands remained subject to the Spanish law, and the authority and power of the Spanish government, as fully as if it had continued the property of the original grantee. Hackley derived no title from the United States, nor were his rights in the land, if he had any, regulated by the laws of the United States, nor under their protection. It was a part of the territory of Spain, and in her possession and under her government, until the ratifications of the treaty were exchanged. And until that time the rights of the individual owner, and the extent of authority which the government might lawfully exercise over it, depended altogether upon the laws of Spain. And whatever rights he may have had under the deed of the duke of Alagon, they were extinguished by the govern-
[*659] ment *from which he held them while the land remained a part of its territory and subject to its laws. It was public domain when it came to the possession of the United States, and he had then no rights in it.

In this view of the case, it is not necessary to examine the other questions which appear in the exception, or have been raised in the argument. The treaty is the supreme law, and the stipulations in it dispose of the case. The judgment of the district court must, therefore, be affirmed.

D E C I S I O N S
OF THE
SUPREME COURT OF THE UNITED STATES.
DECEMBER TERM, 1854.

JUDGES DURING THE TIME OF THESE REPORTS.

HON. RÔGER B. TANEY, CHIEF JUSTICE.	
HON. JOHN M'LEAN,	}
HON. JAMES M. WAYNE,	
HON. JOHN CATRON,	
HON. PETER V. DANIEL,	
HON. SAMUEL NELSON,	
HON. ROBERT C. GRIER,	
HON. BENJAMIN R. CURTIS, AND	
HON. JOHN A. CAMPBELL,	
CALEB CUSHING, Esq., ATTORNEY-GENERAL.	
WILLIAM THOMAS CARROLL, Esq., CLERK.	
BENJAMIN C. HOWARD, Esq., REPORTER.	
JONAH D. HOOVER, Esq., MARSHAL.	

**THE WIDOW AND HEIRS OF BENJAMIN POYDRAS DE LA LANDE,
Plaintiffs in Error, v. THE TREASURER OF THE STATE OF LOUISI-
ANA.**

17 H. 1.

A judgment having been recovered in the highest court of a State by the treasurer of the State, suing *ex officio*, the citation to appear to a writ of error, under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85,) should be served on the treasurer, and not on the governor and attorney-general.

The tenth rule of this court applies only to cases in which a State is a party on the record.

THE case is stated in the opinion of the court.

Poydras de la Lande v. The Treasurer of Louisiana. 17 H.

Dunbar, for the motion.

Janin, contra.

*TANEY, C. J., delivered the opinion of the court.

This case is brought here by writ of error directed to the supreme court of the State of Louisiana, under the 25th section of the act of 1789.

[* 2] * It appears that a proceeding was instituted in the state court by the treasurer of the State to recover certain taxes, alleged to be due from the plaintiffs in error, under a law of Louisiana, which imposes a tax of ten per cent. upon the amount of property inherited by aliens in that State.

The payment of the tax was resisted by the plaintiffs in error; but the case was finally decided against them in the supreme court of Louisiana; and they thereupon brought this writ of error, upon the ground that the authority exercised under the state law was contrary to the constitution and treaties of the United States.

The citation required by the act of 1789, was served on the treasurer, by whom and in whose name, as treasurer, the proceedings had been instituted and conducted, and in whose favor the judgment was entered.

A motion is now made to dismiss this writ of error, upon the ground that the State is the real party to the suit, in the name of the treasurer; and that the citation ought, therefore, to have been served on the chief executive magistrate and attorney-general of the State, according to the provisions of the tenth rule of this court.

But that rule applies to those cases only in which the State is a party on the record. It is intended to point out the officers who shall be held to represent the State when process is issued against it, so far as the service of the process is concerned. The only mode in which a State can be cited to appear, is by serving the process on some one or more of its officers; and those above named in the rule were considered by the court to be its appropriate representatives, in a summons or citation to appear in this court.

But the citation must be directed to the party on the record, and served on him. And when an officer of the State is the party prosecuting the suit for the State, the citation must be served on him. In this case, a notice or citation on the chief executive officer or attorney general would not be sufficient; for the treasurer is the person who has obtained the judgment, and has the right to receive the money. He is the actor — the plaintiff in the suit. And the chief executive officer and attorney-general do not represent him, and may or may not support his proceedings.

Shields v. Thomas. 17 H.

This rule of practice has been uniformly followed in this court. There have been many cases in which an officer of the State, acting in behalf of the State, has been one of the parties. And the tenth rule has never been applied to a case of that kind; and the citation has always been served on the officer, whether conducting the proceedings in his own name, or that * of his office. The [*3] practice is founded upon the language of the act of 1789, c. 20, which directs the "adverse party" to be cited, on a writ of error or appeal. The "adverse party" is the one which appeared in the suit, and who prosecuted or defended it, and in whose favor the judgment was rendered, which the plaintiff, in the writ of error, seeks to reverse.

The motion to dismiss this writ of error must, therefore, be overruled.

JOHN G. SHIELDS, Appellant, v. ISAAC THOMAS and others.

17 H. 3.

A decree that the respondent, as administrator, is accountable to the representatives of the deceased for upwards of \$2,000, may be appealed from by him, though the same decree apportions the amount among the complainants, and the distributive share of each is less than \$2,000.

THE case is stated in the opinion of the court

Platt Smith, for the motion.

Gillett, contra.

TANEY, C. J., delivered the opinion of the court.

This is an appeal from the decree of the district court of the United States, exercising the powers of a circuit court for the district of Iowa. A motion has been made on behalf of * Isaac [*4] Thomas, one of the appellees, to dismiss it, upon the ground that the sum in controversy with him is less than \$2,000.

The facts in the case may be stated in a few words, so far as they are material to the decision of the motion.

John Goldsberry, of Kentucky, died intestate, leaving a large personal estate, to which the present appellees, together with other persons named in the proceedings, were entitled as his legal representatives, in the proportions set out in the proceedings. The widow of Goldsberry obtained letters of administration on his estate, and afterwards intermarried with Shields, the appellant, who thereby obtained possession of the property of the deceased.

Shields v. Thomas. 17 H.

The representatives of John Goldsberry, of whom Isaac Thomas, in right of his wife, is one, filed a bill in the chancery court of Kentucky, against Shields, charging that he had converted to his own use a large amount of the property, to which these representatives were entitled. And in that proceeding they obtained a decree against him for a large sum of money, the shares of the respective complainants being apportioned to them in the decree; and the appellant was directed to pay to each the specific sum to which he was entitled, as his proportion of the property misappropriated by Shields.

The appellant (Shields) lived in Iowa when this decree was made; and the present appellees, who are a portion of the representatives of John Goldsberry, united in the bill in equity now before us, to enforce the decree of the Kentucky court, and praying that Shields might be compelled to pay to them respectively the several sums decreed in their favor in the proceedings in Kentucky; and they obtained the decree in question, according to the prayer of their bill.

The whole amount recovered against Shields, in the proceeding in Iowa, exceeds \$2,000. But the sum allotted to each representative who joined in the bill, was less. And the motion is made to dismiss, upon the ground that the sum due to each complainant is severally and specifically decreed to him; and that the amount thus decreed, is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable. And if this view of the matter in controversy be correct, the sum is undoubtedly below the jurisdiction of the court, and the appeal must be dismissed.

But the court think the matter in controversy in the Kentucky court, was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when [* 5] the amount due was distributed among them, * according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.

It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds \$2,000, an appeal would clearly lie to this court, although the interest of each individual was less than that sum.

This being the controversy in Kentucky, the decree of that court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part; and the amount exceeds \$2,000. We think the court, therefore, has jurisdiction on the appeal.

The cases referred to stand on different principles. The case of *Oliver and others v. Alexander and others*, 6 Pet. 143, was a suit for seamen's wages. And although the crew are allowed by law, for the sake of convenience, and to save costs, to join in a suit for wages, yet the right of each seaman is separate and distinct from his associates. His contract is separate; and his recovery does not depend upon the recovery of others, but rests altogether on its own evidence and merits. And he does not recover a portion of a common fund to be distributed among the claimants, but the amount due to himself on his own separate contract.

The case of *Rich and others v. Lambert and others*, 12 How. 352, was decided on the same ground. The several shippers who owned the goods which had been damaged, had no common interest in the goods. The interest of each was separate; and his contract of affreightment separate. And the libel of each was upon his own contract with the ship-owner, and for his own individual and separate property.

The cases of *Stratton v. Jarvis and Brown*, 8 Pet. 8, and of *Spear v. Place*, 11 How. 525, were both salvage cases, where the property of each owner is chargeable with its own amount of salvage.

* The salvage service is entire; but the goods of each owner [* 6] are liable only for the salvage with which they are charged, and have no common liability for the amounts due from the ship or other portions of the cargo. It is a separate and distinct controversy between himself and the salvors, and not a common and undivided one, for which the property is jointly liable.

The cases relied on are, therefore, distinguishable from the one before us; and the motion to dismiss for want of jurisdiction must be overruled.

18 H. 253.

JOHN ARTHURS, JOHN NICHOLSON, JONAS R. MCCLINTOCK, and WILLIAM STEWART, carrying on Business under the Firm and Name OF ARTHURS, NICHOLSON, AND Co., Plaintiffs in Error, v. JESSE HART.

17 H. 6.

Under the practice in Louisiana, it is not proper to spread upon the record any other evidence than what relates to the points of law raised at the trial, and intended to be reviewed on error; and this court will intend that the record contains all the evidence which bore on those points.

Though it has been held, (9 Pet. 182,) that the admission of evidence, where the judge tries both law and fact, is not a subject of a bill of exceptions, this is not true of the rejection of evidence.

In such a mode of trial, the counsel should present the legal propositions on which he relies, and the court should place on the record its rulings thereon.

It is not a defence to an action on a bill of exchange by an indorsee for value, against the acceptor, that the bill was drawn for work and labor done, and the acceptance made on the faith of the drawer's promise to make good certain defects in the work, which he had failed to do; though the indorsee had notice of these facts before he took the bill

THE case is stated in the opinion of the court.

Wylie, for the plaintiffs.

Lawrence, contra.

[* 11] * NELSON, J., delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the eastern district of Louisiana. The plaintiffs seek to recover the amount of a bill of exchange, drawn by the firm of Nicholson and Armstrong, upon the defendant, for \$2,540.65, and accepted by him, in favor of James Arthurs and Brothers, dated March 1, 1848, and payable twelve months from date, and indorsed by the payees to the plaintiffs. The bill of exchange is set forth in the petition, according to the practice in the State of Louisiana, with a prayer that the defendant be condemned to pay the amount due.

The defendant, in his answer, denies the allegations in the petition; and also sets up, that the bill was accepted for the balance of the price of a sugar-mill constructed by the drawers, for his plantation in West Baton Rouge; that the mill was badly constructed, and defective both in the workmanship and materials, and had failed in its operation to do the work intended; that on making known the defects to the drawers, they promised to send competent workmen, before the next ensuing season for grinding sugar, to make the necessary repairs, and put the mill in complete working order, at their own expense; that, confiding in this promise, the defendant accepted, unconditionally, the bill in question. The answer also sets forth, that

the drawers had failed to send hands to repair the mill, as agreed, whereby the defendant has suffered damages to the amount of \$1,835.65, which sum he demands in reconvention, and asks judgment against the plaintiffs.

The defendant further sets forth, that the payees and indorsees had notice of the defects in the mill, and of the undertaking of the drawers at the time of the acceptance, before the negotiation or transfer of the same.

The cause was tried without a jury; and, on the trial, the defendant admitted the signatures to the bill; and also gave evidence which was admitted, but excepted to, of the facts set up in the answer.

The court gave judgment for the plaintiffs, for \$1,743.50. The case is now before us on a writ of error, brought by the plaintiffs, claiming that they were entitled to judgment for the full amount of the bill.

Two preliminary objections have been taken by the counsel for the defendant in error: 1. That, inasmuch as other evidence was given on the trial in the court below than that which has been brought on the record, or is found in the bill of exceptions, for aught that appears, the judgment may have been founded upon that evidence; and, 2. That the cause having been tried without a jury, and the judge having determined the * case upon both [* 12] the facts and the law, error will not lie for the admission of improper testimony.

It was decided in *Phillips v. Preston*, 5 How. 278, in the case of a writ of error to the circuit court of the United States in Louisiana, and where the trial by jury had been waived, that the state practice regulating appeals for reviewing the decisions of the inferior courts, which required the return of all the evidence to the appellate court, did not apply; and that only so much of it need be returned, and, indeed, no more should be returned, than was necessary to present the legal questions decided by the court, and which were sought to be reviewed. Evidence bearing exclusively upon questions of fact involved in the case, only encumber the record and embarrass the hearing in this court, as these questions are not the subject of review on error. The mere fact, therefore, that other evidence was given on the trial besides that which is found in the bill of exceptions, furnishes no objection to an examination of the questions of law presented by it.

If that evidence bore upon these questions, and might influence our decision upon them, the defendant in error should have brought it upon the record, or incorporated it in the bill of exceptions. His neglect to do so implies that it could properly have no such effect, if returned.

As to the other objection. It was held, in *Field and others v. The United States*, 9 Pet. 182, and recognized in several subsequent cases, that in a cause where the trial by jury had been waived, the objection to the admission of evidence was not properly the subject of a bill of exceptions; and the reason given is, that if the evidence was improperly admitted, this court would reject it, and proceed to decide the cause as if it were not in the record. This, perhaps, is unobjectionable; it certainly is so, as far as the evidence improperly admitted bears upon the question of fact in the cause; for, when rejected, if there is still any proper evidence tending to support the judgment of the court below, the decision cannot be reviewed on a writ of error. The error, in this aspect, would be unimportant, because not the subject of an exception, the question involved being one of fact.

If, upon the rejection of the evidence, no testimony would remain necessary to support the judgment of the court, then the mistake would be one of law, and the proper subject of a writ of error.

The case of a refusal of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it. The exclusion of the evidence might change the legal features of the cause, and lead to a determination of it upon principles wholly inapplicable, in case the evidence [* 13] * had been admitted; nor can we assume that the testimony offered and rejected would have been proved, if it had not been excluded, and revise the judgment of the court upon that assumption; because the offer of evidence to prove a fact, and the ability to make the proof, are very different matters. If the court, instead of rejecting, had allowed the evidence, the party might have failed in the proof, and the case in the result remain the same as before the improper exclusion.

We think, therefore, that the improper rejection of testimony on the trial before the judge, where the jury has been dispensed with, should constitute the subject of review on the writ of error, as in the case of a trial before the jury.

There is one qualification applicable to this peculiar mode of trial, that should be noticed. If the testimony rejected is but cumulative, and relates exclusively to a question of fact involved in the case, the rejection may be immaterial, as the decision of that question upon the evidence already in, by the judge, may be regarded as well warranted.

This principle is sometimes applied in cases of writs of error, where the trial below has been before a jury, if it be seen that the admission of the testimony could not have properly influenced the

jury to a different conclusion on the question of fact. The cases will be found collected on Cowen and Hill's notes, vol. 4, pp. 775, 776, 3d ed.; see, also, 1 Duer, Sup. Court R. pp. 431-434. It must be admitted that the courts which have adopted this principle apply it with great caution where the trial has been had before a jury, and require a clear case to be made out that the rejection has worked no prejudice to the party. Other courts have denied its application altogether, and refused to look into the record to see whether the evidence might or might not have influenced the jury.

In cases where the trial by jury has been waived, and the facts as well as the law submitted to the judgment of the court, a more liberal application may be safely indulged; though, if the determination of the question of fact be against the party offering the evidence, we do not perceive why the rejection should not be regarded as error reviewable on the bill of exceptions.

A more difficult question arises in these cases, where the facts as well as the law are submitted to the court, in reviewing on exceptions the correctness of the ruling of the law involved in rendering the judgment.

In trials before a jury, these come up on the instructions prayed for, or by exceptions to the charge. The questions of law are thus separated from the questions of fact, — the former to be determined by the court, the latter by the jury. But where both questions are submitted to the court, and both determined *at the [*14] same time and by the same tribunal, the separation is more difficult. The principles of law applicable to the case are so dependent upon the facts, and the finding of these in the case supposed exclusively within the province of the judge, who is substituted for the jury, it would seem, as a general proposition, nearly impracticable for the appellate court to ascertain from the case the principles of law that had governed the decision; especially in the absence of his opinion in the case.

But these principles must be ascertained, to enable the court to review them on a writ of error, as the bill of exceptions lies only upon some point arising either upon the admission or refusal of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. 4 How. 297; 8 J. R. 495; 2 Caines, 168.

As an illustration of the difficulty, and to aid us in the solution of it, we may refer to a late act in England, and the decision of the common bench under it. It is the act of 13 and 14 Victoria, c. 61, which conferred upon the county courts a limited jurisdiction in civil cases, and gave an appeal from their determination "in a point of

law, or upon the admission or rejection of evidence," "to any of the superior courts of the common law at Westminster."

It will be seen that an appeal is given here upon the same ground that a bill of exceptions was given by the statute of Edward I. c. 31. The parties were at liberty to waive a trial by jury, and submit the facts, as well as the law, to the judge of the county court. A case came up before the common bench, that had been thus submitted, involving a question upon the statute of limitations, and which presented the difficulty we are now considering.

Maule, J., who delivered the opinion of the court, in endeavoring to overcome it, observed: "It may be that if, upon the case stated by the parties or by the judge, it appears to the court of appeal that the decision which has been come to can be sustained by a particular view of the facts, which does not render it necessary to arrive at the conclusion that he has erroneously decided the point of law before him, this court may have no power to review the judgment; yet, that where it is manifest from the facts stated, that in order to arrive at the conclusion he has arrived at, the judge must have decided a matter of law in a certain way, that will be a determination in point of law, with respect to which an appeal will lie. So that, supposing there be a judgment which can be sustained consistently with the law, by any view that can be taken of the facts stated, such a judgment probably cannot be reversed; yet, still, where the judge states the facts which were before him, and these facts will [* 15] sustain * his judgment upon one view of the law only, and that an incorrect one, this court may have jurisdiction to entertain the appeal."

This view is directly applicable to the case of a bill of exceptions, where the jury has been dispensed with, and the judge substituted in its place, to pass upon the facts as well as the law, and furnishes the rule by which the point of law may be ascertained that was decided in rendering the judgments intended to be reviewed.

In order, however, to disembarass the proceedings, as far as practicable, in this peculiar mode of the trial of a common law case, and to enable the appellate court to reëxamine the point or points of law involved, the counsel, after the close of the evidence, should present the propositions of law which, it is claimed, should govern the decision; and the court should state the rulings thereon, or in coming to its determination. And, in the return to the writ of error, so much of the evidence, and no more, should be incorporated in the bill of exceptions, as was deemed necessary to present the points of law determined against the party bringing the writ. No technical exception need be stated, except in the case of the rejection or admission

of evidence. As the rulings in the final determination do not take place upon the trial, or need not, the exception would be impracticable.

We have stated more at large the proper practice in bringing up for review cases of this peculiar character, than was necessary to the disposition of the one before us, as they are frequently occurring, and the practice governing them not very well settled.

As it respects the case in hand, we have already shown that the state practice of Louisiana, in appeals, does not apply to the case of writs of error from this court to the circuit courts; and hence, the circumstance that other evidence had been given and was before the court, than what appeared in the bill of exceptions, furnished no objection to the reëxamination of the point of law there presented; and that, if the other evidence was deemed material, it should have been brought upon the record by the defendant in error. We must assume, therefore, that the bill of exceptions contains all the testimony deemed material to raise the point of law involved.

That shows the admission of the proof of a state of facts, as a special defence to the bill of exchange, which had been set up, and the only one set up, in the answer, namely, that the bill had been accepted for the balance of the price of a sugar-mill constructed and sold to the defendant by the drawers; that the mill was badly constructed, and defective in workmanship and materials; that, at the time of the acceptance, the drawers promised, *at [* 16] some future day, to make the necessary repairs; that they had failed to make them, by which the defendant had suffered damage to the amount of \$1,835.60, which he claimed in abatement of the face of the acceptance, and that the plaintiffs had notice of these facts before the transfer of the paper to them.

The court below reduced the recovery to \$1,743.50, which must have been on the ground of this special defence, as no other appears in the record.

Now, we agree that, if this suit had been between the original parties, the defence would have been unobjectionable. 9 How. 213; Code of Practice, 374-377; 6 N. S. 671; *ibid.* 688. But the plaintiffs are *bonâ fide* holders of the paper, for value, and therefore not subject to this defence, or to any abatement of the face of the bill, arising out of the transaction between the original parties.

It is true, the plaintiffs knew, at the time they took the paper, that it was given as part of the price for the sugar-mill, and that the mill had been defectively constructed; but they also knew that the defendant, upon the promise of the builders to make the necessary repairs, had agreed to accept the bill unconditionally, and had accepted

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it accordingly. They knew, therefore, that he looked to this undertaking for indemnity, and not to any conditional liability upon the acceptance.

The transaction, therefore, which is brought home to the plaintiffs, lays no foundation, in law or equity, to impeach the paper in their hands.

The ruling of the court below, in this respect, was consequently erroneous, and the judgment must be reversed.

18 H. 60; 20 H. 427; 1 Wal. 99; 4 Wal. 572.

JAMES UDALL, Libellant and Appellant, v. THE STEAMSHIP OHIO, her Tackle, &c., MARSHALL O. ROBERTS and others, Claimants.

17 H. 17.

An appellant cannot sustain his appeal upon the ground that, if interest were added to the balance of account claimed in the libel, more than \$2,000 was in dispute, at the time of the decree in the circuit court, unless his libel claims interest.

This court will not allow the libel to be amended here, by the insertion of a claim of interest, so as to support the jurisdiction.

THE case is stated in the opinion of the court.

Cutting, for the motion.

Bradley, (with whom was *Benedict*,) contra.

M'LEAN, J., delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the southern district of New York, in admiralty.

The libel was filed in the district court, which stated that, in the years 1847 and 1848, the steamship Ohio, then being in process of construction, by Bishop and Simonson, the libellant furnished, at the city of New York, for the building of said vessel, a large quantity of materials, timber, and tree-nails. That said articles, at a fair price, amounted in the whole to the sum of \$2,973.57, of which sum there is still due \$2,159.28, less tree-nails, which, not having been used, were to be received back by the libellant, amounting to the
* 18] sum of \$468. That * the balance of \$1,691.28, the owners, or those in charge of said vessel, have refused to pay, &c.

The appeal states the claim to be, at the time of the trial in the circuit court, interest included, \$2,164.86.

The libel was dismissed in the district court, and the case was appealed to the circuit court. In that court, the decree of the district court was affirmed, from which an appeal was taken to this court.

A motion is now made to dismiss the appeal, for want of jurisdiction.

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It is stated by the counsel opposed to the motion, that it is the uniform practice in the southern district of New York, to establish, on the hearing, only the liability of the defendant, and to have the amount of the damages ascertained on a reference to a commissioner, as the proofs in the record are not the full proof as to the amount of the damages.

It is not perceived how the practice in the circuit court can affect the question of jurisdiction. The decree of the district court, which dismissed the libel, having been affirmed by the circuit court, we must look to the claim of the appellant in his libel, whether it exceeds the sum of two thousand dollars. The balance of the account claimed, only amounts to the sum of \$1,691.86. But it is insisted that, if the interest on this sum be computed, up to the time of trial in the circuit court, the sum would exceed the amount required to give jurisdiction.

Where the claim is founded on dollars and cents, whether it be a libel, a bill in chancery, or an action at law, the damages must appear, to give jurisdiction, on the face of the pleading on which the claim is made. No computation of interest will be made to give jurisdiction, unless it be specially claimed in the libel. If not intended to be included in the claim of damages, it should be specially stated. This would certainly be the case in an action at law, and no reason is perceived why the rule should be relaxed in a case of libel.

Under the 24th admiralty rule of this court, it is suggested the libel may be amended at any time, as, of course, on application to the court. And if this be necessary, the counsel now moves to amend the libel by inserting, "together with the interest to the time of the final decree in this court, or any appellate court."

It has not been the practice of this court to allow amendments, except by the consent of parties; though, in the case of *Kennedy et al. v. Georgia State Bank*, 8 How. 610, this court say, "there is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments," &c.; but the practice has been to remand the cause to the lower court for amendment.

* If amendments be allowed, so as to give jurisdiction to [* 19] this court, where there was no jurisdiction when the trial was had and the appeal taken, parties would be taken by surprise, and litigation would be encouraged. The plaintiff, under such circumstances, would never fail to sustain the jurisdiction of this court, on his appeal.

On the ground that the matter in dispute does not appear, on the face of the libel, to exceed two thousand dollars, the appeal is dismissed.

JAMES N. OLNEY, Libellant and Appellant, v. THE STEAMSHIP FALCON her Tackle, &c., and GEORGE LAW and MARSHALL O. ROBERTS Claimants.

17 H. 19.

The next preceding decision applied to this case.

A claim in a libel of "\$1,800 and upwards," will not support an appeal.

THE case is stated in the opinion of the court.

Cutting, for the motion.

Bradley, (with whom was *Benedict*,) contra.

[* 21] M'LEAN, J., delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the southern district of New York, in admiralty.

A motion is made by defendants' counsel to dismiss the appeal, for want of jurisdiction.

[* 22] * In the libel, "the shipment of a box of merchandise, which was not delivered to the consignee, &c., is alleged, and that the libellant is entitled to recover of said vessel the damages by him sustained, which amount to the sum of eighteen hundred dollars and upwards," &c.

The district court dismissed the libel, from which decision an appeal was taken to the circuit court, and that court affirmed the decision of the district court. From this last decision, an appeal has been taken to this court.

On the part of the appellant it is stated, that the claim was for eighteen hundred dollars and upwards, besides the interest; that, on the hearing, the libellant claimed the said principal and interest, amounting to two thousand two hundred and fifty dollars, and that he was entitled to recover, on his proofs and allegations, that sum. That this was the claim at the time of the appeal, and that another year's interest has since accrued. And it is contended that the sum sworn to, being eighteen hundred dollars and upwards, was intended to cover the accruing interest.

The right of appeal from the circuit to the supreme court is given, "where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs." The defendant can appeal, where the judgment or decree against him exceeds the sum or value of two thousand dollars; but an appeal may be taken by the plaintiff where his claim of damages, in the declaration or libel, exceeds the above sum, or where the value of the thing claimed exceeds it, as this is held to be the matter in dispute.

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The appellant, in this case, claims in his libel, which is sworn to, eighteen hundred dollars and upwards. The words, "and upwards," it is said, were intended to embrace the interest, and that, if this be calculated from the time of filing the libel up to the time of the trial, the sum would exceed two thousand dollars.

The interest, in an action of this kind, if taken into view, is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. The claim of more than eighteen hundred dollars, is too indefinite to give jurisdiction under the act of congress; and the interest not being specially claimed, for the reason stated, cannot be computed. The appeal is, therefore, dismissed, for want of jurisdiction. *Gordon v. Ogden*, 3 Pet. 34; *Scott v. Lunt's Administrator*, 6 Pet. 349.

MARCELIN HAYDEL, Plaintiff in Error, v. FRANCOIS DUFRESNE.¹

17 H. 23.

Under the fifth section of the act of March 3, 1811, (2 Stats. at Large, 663,) prescribing the terms on which proprietors of contiguous lands, on a stream, in Louisiana, could obtain titles to adjacent back lands belonging to the United States, where each of two proprietors could not obtain his full quantity by reason of the directions of their side lines, a division between them of such back land, made, in good faith, by the principal deputy surveyor of the proper district, under the superintendence of the surveyor of public lands south of the State of Tennessee, was final, and conclusive upon their respective rights, and cannot be disturbed by any court of justice.

ERROR to the supreme court of Louisiana. The case is stated in the opinion of the court.

Janin, for the plaintiff.

Grailhe, contra.

* CATRON, J., delivered the opinion of the court. [* 27]

The plaintiff and defendant are respectively owners of tracts of land forty arpens deep, situate in a concave bend of the Mississippi River, in Louisiana; their tracts front on different sides of the deepest point of land, and when the side lines of each tract are extended perpendicular to a base line corresponding with the bank of the river, the two tracts interfere before the second depth of forty arpens is obtained.

By the 5th section of an act approved the 15th of February, 1811,²

¹ Mr. Justice Wayne, having been indisposed, did not sit in this cause.

² The act intended to be referred to is that of March 3, 1811, § 5, which reenacts this 5th section, but repeals the act of February 15, calling it an act of February 16, (2 Stats. at Large, 619-663.)

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congress provided "that every person who, either by virtue of a French or Spanish grant, recognized by the laws of the United States, or under a claim confirmed by the commissioners appointed for the purpose of ascertaining the rights of persons claiming lands in [*28] the territory of Orleans, owns a tract bordering * on any river, creek, bayou, or watercourse, in the said territory, and not exceeding in depth forty arpens French measure, shall be entitled to a preference in becoming the purchaser of any vacant tract of land adjacent to, and back of his own tract, at the same price and on the same terms and conditions as is or may be provided by law for the public lands in said territory. And the principal deputy surveyor of each district, respectively, shall be, and he is hereby authorized, under the superintendence of the surveyor of the public lands south of the State of Tennessee, to cause to be surveyed the tracts claimed by virtue of this section. And in all cases where, by reason of bends in the river, lake, creek, bayou, or watercourse bordering on the tract, and of adjacent claims of a similar nature, each claimant cannot obtain a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object between the several claimants in such a manner as to him may appear most equitable.

Those under whom the plaintiff and defendant hold their lands, respectively, availed themselves of the preëmption accorded by this law. The husband of the plaintiff, having $155\frac{3}{8}$ acres in his front tract, paid into the hands of the receiver of public moneys, \$148.75, for a certificate of the entry of 119 acres of the lands in his rear. Nicholas Haydel, under whom the defendant holds, owned a front tract containing $249\frac{5}{8}$ acres, and paid into the hands of the receiver of public moneys the price of 248 acres, for his entry of the back lands, under the law.

The whole quantity of land in the rear, subject to their entries, was $322\frac{4}{8}$ acres, as to which there was no conflict between them and any other proprietors. Of this quantity the principal deputy surveyor of the United States allotted to Haydel $243\frac{2}{8}$ acres, and Dufresne $79\frac{2}{8}$. His survey dividing the land in dispute was part of a township survey, and was approved in March, 1831, by the surveyor of public lands south of the State of Tennessee, and a patent was issued to Haydel for $243\frac{2}{8}$ acres of the land, in 1845.

The petition charges error in the division, but nothing more, and asks a redivision of the land by the district court, on the sole ground of a vested equity in the plaintiff to forty acres of the land granted to Haydel. It is not alleged that Haydel controlled the surveyor, or

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had any connection with, or even knowledge of, the alleged error when the survey was made.

On this state of pleading and fact, the district court decided for the defendant, and dismissed the petition; and an appeal was prosecuted to the supreme court of Louisiana, which reversed the judgment of the district court, and ordered that * court [* 29] to cause the land in dispute to be divided by a resurvey, so as to give Dufresne forty acres of the land for which Haydel had obtained a patent. This judgment was given on the assumption that, by their respective entries in the district land-office, each party took an equity in the back land in proportion to the quantity of his front tract, when compared with the contending tract; and that thus the respective equities stood before and at the time when the lands were officially surveyed; and that the principal deputy who laid off the lands, under the supervision of his principal, acted in a merely ministerial capacity, and had no discretion to divide them so as to give Dufresne less than a full proportion of the whole. If it be true, that irregular entries of unsurveyed back lands, which entries were allowed by courtesy of the general land-office, vested an equity in the enterer, and divested the United States of title, as the state court held, then it must follow, that after the entries were generally made in this loose form, throughout the coast of the Mississippi River, in Louisiana, that the courts of justice might have decreed partitions among front proprietors, in all instances, and have had the lands surveyed by judicial authority, and superseded the action of the United States altogether, as required by the act of 1811.

These anomalous entries were conditional, and made subject to a future public survey; to this effect the receipt for the money was given by the receiver, and the register was instructed not to transmit the certificate of purchase until the survey was completed.

The constitution vested congress with power to dispose of the public lands, and to make all needful regulations for this purpose; and as respects the class of lands under consideration, the proper department ordered, as a rule having few exceptions, that they should be laid down as part of a general plan of township surveys, and in connection with the public lands and private claims adjoining; and that this general survey should settle the quantity and form of each tract of back land to which a front owner had a preference of entry.

In this instance, the survey was made by the principal deputy of the proper district, under the superintendence of the surveyor of public lands south of the State of Tennessee, as required by law; by this survey, it was ascertained that neither of the claimants here litigating could obtain a tract equal in quantity to his front tract; and,

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therefore, it became necessary for the surveyor, assisted by his immediate superior, to divide the vacant land between these two front owners, "in such manner as might seem to him most equitable."

When the survey was approved, if the party here suing supposed himself aggrieved, * he was authorized to appeal from the decision of the principal deputy, and the surveyor general south of Tennessee, to the commissioner of the general land-office; and from his decision, if unfavorable, to the secretary of the treasury.

Congress contemplated that these lands should be divided among front proprietors, by a surveyor on the ground, aided by his principal; these officers were bound to act according to their best judgment, and decide as judges on the equities of these claimants; nor could the courts of justice interfere to control their acts, if they were honestly performed; the contrary of which is not alleged in this case.

This construction of the law is altogether necessary, as great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do.

It is ordered that the judgment of the supreme court of Louisiana be reversed.

THE YORK AND MARYLAND LINE RAILROAD COMPANY, Plaintiff in Error, v. ROSS WINANS.

17 H. 30.

A railroad corporation created, by the State of Pennsylvania, and which built and owned a railroad within that State, is liable in an action for the use of a patented improvement on cars run on that road, though another corporation, created by the State of Maryland, held all its stock, provided the cars, and worked the road, charging to the Pennsylvania corporation the expense of doing so, and crediting it with the earnings on the road.

ERROR to the circuit court of the United States for the eastern district of Pennsylvania. The case is stated in the opinion of the court.

J. M. Campbell and Johnson, for the plaintiffs.

St. George Tucker Campbell and Latrobe, contra.

[* 38] * CAMPBELL, J., delivered the opinion of the court.

The plaintiff is a corporation existing under a charter from the State of Pennsylvania, and authorized to construct a rail-

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road from the town of York to the Maryland line. Its stock was subscribed for by the Baltimore and Susquehanna Railroad Company, a Maryland corporation, and their joint capital is vested in a continuous railroad from the city of Baltimore to York. The management of the road is committed to the Maryland company, which appoints the officers and agents upon it, and furnishes the rolling stock necessary for its operation. The president and secretary of the two companies are the same. The directors of the Pennsylvania corporation (plaintiff) are selected by the Maryland company, and are qualified by a transfer of one or more shares of its stock to them, shortly before an election, and which they return on vacating their office. This nominal organization is made necessary by the charter, which requires that the majority of the officers shall be citizens of Pennsylvania, and that annual reports of the condition and business of the company shall be rendered to the legislature. To preserve appearances with the legislature, an annual statement is made.

* In this, the gross receipts of the entire road for the year [* 39] are ascertained, and the expenses deducted; the balance is then divided, one third being assigned to the plaintiff; but no money passes between the corporations. In these expense accounts, the salaries of officers, conductors, and engineers, the cost of locomotives and fuel, of the repairs and insurance of cars, and the losses of business, enter as constituent items. It was admitted upon the trial of the cause, that a number of cars made according to the specification of the patent of the defendant, had been used upon the road without his license, and for which he brought this suit. A verdict was rendered in his favor, and the judgment thereon is brought to this court, upon exceptions to the instructions of the circuit court, to the jury.

The court charged the jury, that the road on which the infraction was committed, was held under a Pennsylvania charter to the defendant in that court; that the transportation on the road was carried on by the Maryland corporation; and that the profits accruing from the use of the cars upon the road, that is, the profits of the infraction, are nominally divided between the two companies. That, upon these facts, the plaintiff is entitled to recover against the present defendants, whether they are to be regarded as partners, or as principal, or agent of the Maryland corporation.

The plaintiff complains here of this charge, for that the cars employed were not built by and did not belong to the company; that they were the exclusive property of the Maryland corporation; and that the agreement to divide the profits did not constitute a partnership, nor evince a relation of principal or agent to impose a liability.

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This conclusion implies, that the duties imposed upon the plaintiff by the charter, are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature. *Beman v. Rufford*, 1 Simon N. S. 550; *Winch v. B. and L. Railway Company*, 13 L. and E. 506.

If, then, the case had terminated with the facts that the infringement of the defendant's patent had taken place, by the acts [* 40] * of persons using the corporate name of the plaintiff, with the assent of the corporate authorities, their liability would have been fixed.

But the case before us is, that the motive power on the road partly belongs to the plaintiff; that the agents and officers employed are in its service and are paid by it; and that the cars are fitted and repaired at the common expense of the two corporations. It follows, therefore, that the plaintiff is a principal, coöperating with another corporation, in the infliction of a wrong, and is directly responsible for the resulting damage.

Nor will the plea that the corporation has no independent nor responsible existence, as regards the Maryland company, and that its display of a president and directors, of conductors, engineers, and agents, of annual elections and annual statements, import only a formal and illusive representation before the legislature of Pennsylvania, or their constituents, of a compliance with the conditions of the charter, avail the plaintiff. It is certainly true that the law will strip a corporation or individual of every disguise, and enforce a responsibility according to the very right, in despite of their artifices. And it is equally certain that, in favor of the right, it will hold them to maintain the truth of the representations to which the public has trusted, and estop them from using their simulation as a covering or defence. *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

The supreme court of Pennsylvania, in *Peters v. Ryland*, 8 Harris, 497, has announced principles decisive of this case.

The court held that the owner of a passenger car employed on a

railroad belonging to the State, and the motive power and superintendence of which is furnished by the State, is responsible for the misconduct of the public agents. It says: "The case before them is *sui generis*; but it comes much nearer to that class of decisions in which it has been held, that several parties engaged in carrying over different portions of the same line of conveyance, each sharing in the profits of the whole route, and of course of each section of it, are all responsible for the faithful discharge of their duty, and liable to respond in damages for any injury which results from the negligence or unskilfulness of any of the proprietors and servants." 11 Wend. 571; 18 *ibid.* 175; 19 *ibid.* 534.

"The State, as well as the carrier, is paid for every passenger transported on this railroad, which shows their community of interest; and if there be a common liability, that of the State cannot be enforced by action; and this circumstance does not diminish that of the carrier; because they have a common interest, however, and share the business of transportation, it is apparent that, in holding the party before us to answer for the *negligence [* 41] of the State's agents, we do not punish one man for the misfeasance of another's servants."

The objection taken to the patent, that it is signed by "an acting commissioner of patents," and that the record contains no averment nor proof of his title to the office, is not tenable. The court will take notice judicially of the persons who from time to time preside over the patent office, whether permanently or transiently, and the production of their commission is not necessary to support their official acts. *Wilson v. Rousseau*, 4 How. 686.

The judgment of the circuit court is affirmed.

THE UNITED STATES, Appellants, v. DANIEL W. COXE and others.

17 H. 41.

United States v. King et al. 7 How. 833, and same v. *Turner's Heirs*, 11 How. 663, affirmed, and applied to this case.

APPEAL from the district court of the United States for the eastern district of Louisiana.

Cushing, (attorney-general,) for the appellants.

Coxe, contra.

TANEY, C. J., delivered the opinion of the court.

* This case cannot be distinguished from the case of *The* [* 43]

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United States v. King *et al.* 7 How. 833, and of United States v. Turner's Heirs, 11 How. 663.

The decree of the district court must, therefore, be reversed, and a mandate issued to the court below to dismiss the petition.

PIERRE BARRIBEAU and EUPHRASIE T. PERRY, Appellants, v. JOSHUA B. BRANT.

17 H. 43.

A question upon the evidence, whether certain deeds were obtained by fraud.

Upon the death of a complainant in equity, only his legal representatives can revive the suit.

An assignee cannot appear.

Under the 61st rule of this court, where the representatives of a deceased complainant and appellant did not appear after the lapse of two whole terms succeeding the suggestion of his death, the suit was entered as abated.

THE case is stated in the opinion of the court.

Bradley, for the appellants.

Lawrence, contra.

TANEY, C. J., delivered the opinion of the court.

[* 44] * This is an appeal from the decree of the circuit court of the United States for the district of Missouri, sitting as a court of equity.

The case is this: Pierre Barribeau was seised in fee-simple of a lot of ground in the town of St. Louis; and, by deed dated May 8, 1829, conveyed it to Joseph White, in trust for the grantor, during his life, and after his death for his two sons, Adrian and Pierre, and his adopted daughter, Euphrasie, who had grown up in his family.

After the death of the grantor, his sons, Adrian and Pierre, and White, the trustee, joined in a deed to Brant, the appellee, for all the interest of the two sons in the lot. But at the time this deed was made, Pierre had not attained the age of twenty-one years. Subsequently, however, he executed a deed of confirmation, and in that deed professed to convey two undivided third parts of the premises.

Euphrasie, the adopted daughter, executed a deed to Amaranth Loiselle, purporting to convey the whole of this lot. And, afterwards, she and Amaranth made separate deeds, on the same day, to Samuel Merry, for her third part of the premises; and Merry afterwards conveyed to Brant. If, therefore, the several deeds above mentioned are valid, Brant is entitled to the whole lot.

Adrian died intestate, and without issue. And, after his death,

Pierre and Euphrasie filed this bill, charging that all of the deeds made by them respectively, and by Adrian in his lifetime, were obtained by misrepresentation and fraud; that they were illiterate, and did not understand the object and effect of these instruments when they were executed; and that the consideration paid was far below the real value of the property. The bill further charged that Pierre was still under the age of twenty-one when he made the deed of confirmation.

The answer of Brant denies all fraud and misrepresentation, and avers that the parties were perfectly aware of the contents of the several instruments when they were executed, and that the price was a fair one, according to the value of the property at that time; and that Pierre was of full age when he made the deed of confirmation.

Many witnesses were examined by the parties in support of their respective allegations, and, at the final hearing, the bill of the complainants was dismissed by the circuit court. And from this decree the complainants have brought this appeal.

It would be tedious and useless, in this opinion, to go into an examination of the testimony given by the different witnesses. Much of it has very little, if any bearing upon the question in dispute. It is very evident, indeed, that the complainants were illiterate * and weak-minded. But there is abundant proof that they [* 45] were perfectly aware of the contents of the several instruments, and of the object and purpose for which they were executed. And, although the prices paid for the different interests were undoubtedly very moderate; yet they were not so inadequate as to authorize the court to declare the deeds void on that ground. The inadequacy must be tested by the value of the property at the time of the sales, and not by its present value. The first deed from the two Barribeaus and White to the respondents, was made September 3, 1833. The deed of confirmation from Pierre, August 7, 1836; and the deeds from Euphrasie, and Amaranth Loïselle to Merry, February 1, 1836. The complainants did not seek to disturb these conveyances, or take any measures to impeach them, until March 20, 1849, when this bill was filed, and when property in St. Louis was greatly enhanced in value, as compared with its value in 1833 and 1836. It is, perhaps, the great increase in the value of this property between the time of the several sales and the time of filing this bill, that has led to this controversy. But upon the evidence in the record, we think the charge of fraud and misrepresentation is not sustained; and that there is sufficient proof, that Pierre was of full age at the time the deed of confirmation was executed.

It has been contended, on the part of the complainants, that under the deed from Pierre Barribeau, the elder, to White, the three *cestui que trusts* took a joint interest, and that, upon the death of one or more of them without lawful issue, the share of the deceased was limited over to the survivors or survivor. And as Adrian died before the filing of the bill, and Pierre has died pending this appeal, and both of them without lawful issue, Euphrasie, the surviving complainant, claims the entire lot, by virtue of the limitations over in the deed of trust. And if this be the construction of the deed, she is entitled to a decree for the shares of the two sons, although she has sold and conveyed her own one third, as above stated.

But this construction cannot be maintained. The trust deed, it is true, is unskillfully drawn. But it is very clear, upon the whole instrument, that an equitable interest, as tenants in common in fee-simple, was secured to them by the deed; and that their conveyances, together with that of the trustee, passed the whole interest, legal and equitable, to the respective purchasers.

It appears that shortly after this bill was filed, Pierre, the complainant, conveyed all his interest in the property to Benjamin A. Massey, in trust for a natural daughter, born of an Indian mother, and living in the Indian country; and a motion has been made to make him a party in this court, as the representative of Pierre.

[* 46] *The decision of this motion, either way, could have no influence upon the rights of the parties. For as the court is of opinion that the deed of confirmation made by Pierre was valid, and conveyed his one third to the appellee, the decree in the court below dismissing the bill, must be affirmed, even if Massey was permitted to appear.

But in this stage of the proceedings, he cannot be permitted to become a party, as the representative of Pierre. The bill was filed by Pierre, and this appeal taken by him. He has died pending this appeal; and the only persons who, upon principles of law and the rules of this court, can be permitted to appear in his stead, are those who, upon his death, succeed to the interest he then had, and upon whom the estate then devolves.

But the interest of Massey was acquired in the lifetime of Pierre, and no new interest accrued to him upon Pierre's death; and if he desired to become a party, in order to maintain his rights as trustee, he should have applied for leave to become a complainant while the case was pending in the circuit court. The estate has not devolved upon him by the death of Pierre, and he has the same interest now which he had upon the execution of the deed; and has no greater right to become a party here, after Pierre's death, than he had before.

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In the opinion of the court, therefore, as Pierre's death was suggested at December term, 1851, and his legal representatives have not appeared by the tenth day of this term, the bill must, as to him, be entered, abated under the 61st rule of this court. And, as regards Euphrasie, the other complainant, it must be dismissed with costs.

ROBERT WICKLIFFE, Appellant, v. THOMAS D. OWINGS.

17 H. 47.

Bill to establish the possession and quiet the title of the complainant to lands in Kentucky, sustained.

The statute in Kentucky upon the subject of this remedy is not without influence upon the question of the propriety of this exertion of an established chancery power.

If the record contain proper averments of citizenship to give the circuit court jurisdiction, they can be traversed only by a plea to the jurisdiction.

THE case is stated in the opinion of the court.

Preston, (with whom was *Charles A. Wickliffe*,) for the appellant.

No counsel, *contra*.

CAMPBELL, J., delivered the opinion of the court.

The plaintiff filed his bill in the circuit court of the United States for Kentucky, against Thomas Deye Owings, by [* 48] which he assumes to be the owner, and in the lawful possession, of a number of tracts of land, lying in different counties of that State, which had at one time been the property of the defendant, but of which he had been legally divested, and notwithstanding claims, by the instigation and advice of other persons, to the prejudice and vexation of the plaintiff. The object of the bill is to establish the title and to quiet the possession of the plaintiff.

The facts disclosed by the record are: that, in the years 1817 and 1818, the defendant was possessed of a very large estate in lands, but was indebted beyond his means of payment. During those years, two of his creditors, Luke Tiernan and Samuel Smith, respectively recovered, in the circuit court of the United States for Kentucky, judgments for the aggregate sum of twenty-five thousand dollars and upwards; the one by default, the other by confession. Immediately thereafter, the defendant adopted a system of legal proceedings, to postpone the day of payment of those judgments, which terminated in the augmentation of the debt, and the introduction of other persons, in the character of sureties, to share in the entanglements of the debtor. By the interposition of injunctions, replevin, and stay

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bonds, and for the want of bidders at execution sales, the defendant withstood his creditors until 1824.

In November, 1824, Tiernan purchased a number of the tracts in dispute, and others in 1827 and 1834, under the executions, and for which he has the deeds of the marshal.

In 1820, Samuel Smith assigned his judgment to Ellicott and Meredith, in trust for creditors, and these persons, between 1826 and 1829, purchased nearly, if not all, of the tracts for which Tiernan had acquired a title.

In 1824, before any of these sales, Owings had conveyed the lands to the sureties whom he had involved upon the bonds before referred to in these and other cases, for their indemnity, and delivered to them the possession of the property, and ceased to have any control of it. He gave to them authority to "sell, dispose of, and convey any of the estate, whenever it might be necessary for their protection," and in such cases as a majority of them might consider as most beneficial to all concerned, in case their principal was in default. Tiernan, and Meredith and Ellicott, in 1827, commenced suits for various parcels of the lands they had purchased at the marshal's sales, in the circuit court of the United States, and recovered judgments. The questions involved in the issues, appear to be the regularity of the sales by which they acquired title. In 1829, after a portion of these trials, the

sureties and assignees of Owings executed a deed to Ellicott and Meredith, for the tracts of land described in the bill, upon "a general compromise" with them, by which the debt to Samuel Smith, with the various bonds taken to secure it, were surrendered to be cancelled. The record shows that Owings was advised of this settlement, and expressed approbation of it. Some time after this settlement with the assignees of Owings, an arrangement was concluded between Tiernan, Ellicott, and Meredith, and The Bank of the United States, by which the bank agreed to reimburse Tiernan for his debt and advances, and to cancel an indebtedness of Smith, and to take the title to the property they had acquired by these proceedings. This arrangement was carried into effect by a suit in the circuit court of the United States, in which a sale was ordered, at which, in 1834 and 1835, the bank became the purchaser.

In 1836, the bank sold its title to the plaintiff in this suit. In order to free the title from any imperfections, a bill was filed in the circuit court of Bath county, Kentucky; and in that suit, the titles of Tiernan, Ellicott, and Meredith, and the bank, were, in 1848, conveyed to him.

In the course of these proceedings, a number of confirmatory deeds

were taken from purchasers of portions of the property at the marshal's sales, which it is unimportant to describe. To appreciate fully the case of the plaintiff, it is proper to notice a transaction between him and Mr. Bascom, the son-in-law and attorney in fact of Owings, in 1837. The plaintiff, after the acquisition of his titles from the bank, instituted suits for the recovery of the family residence and other lands of the defendant, in the courts of Kentucky. At the trial term of these suits, a proposal for an adjustment was submitted to the plaintiff, by Mr. Bascom, (under the advice of counsel,) which was accepted by him. He agreed to convey to Mrs. Bascom the family residence and other lots, a balance due on the judgment of Tiernan, to release the claim for mesne profits, and to dismiss the suits pending, each party to pay costs. Owings and Bascom were to confirm the title acquired by the plaintiff, to the lands described in the bill. This settlement was executed by the delivery of the proper evidences of title. Those in the name of Owings were executed by Bascom, as his attorney in fact.

The land conveyed to Mrs. Bascom has remained in the family till this time, and in 1847, was divided among the children of Owings, in a suit to which he was a party. The validity of the conveyance of Wickliffe to her, was asserted in that suit, and admitted in the decree of the court, as the basis upon which it was founded. Owings, in 1836 or 1837, left the United States for Texas; during the interval, from 1837 to 1849, the plaintiff was in the open possession of the property. Before the departure of Owings, the plaintiff had offered to reconvey to him the * whole of his [* 50] purchases, upon an extended credit and a reduced rate of interest, for the consideration of the debts and costs they represented; which proposal Owings acknowledged his inability to accept, and fulfil the obligations he would thus incur. In 1849, he was induced to return to the United States, and to renew the controversy which had been so long pending, by the assertion of pretensions hostile to the title of the plaintiff, and prejudicial to his useful and peaceful enjoyment.

The evidence shows that the lands are in the possession of the plaintiff, occupied by a numerous body of tenantry; that sales have been obstructed and rents diminished by the assertion of these claims.

The right of the plaintiff to relief is rested upon the general principles of equity, as well as a statute of Kentucky, to the effect "that any person having both the legal title to, and the possession of land, may institute a suit against any other person setting up a claim thereto, and if the complainant shall establish his title, the defendant shall be decreed to release his claim." 1 Bro. and More, Stat. 294.

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The jurisdiction of a court of chancery to grant perpetual injunctions for quieting inheritances, after the right and matter in question has been fairly settled by concurring verdicts, has been long established; and in addition to this general ground for equitable interference, this case presents a strong claim for the interposition of the court, arising from the settlement between Bascom, as the attorney in fact of the defendant, and the plaintiff. The consideration of that settlement has been enjoyed for many years, by the family of Owings. We conclude that this arrangement, embracing the fact that a confirmatory deed to the plaintiff had been executed in his name, under the letter of attorney to Bascom, was communicated to him, and that it received his approbation. If additional assurances were, therefore, required to perfect the title of the plaintiff, and to maintain his quiet enjoyment, it is the duty of the court to exact them.

But if a question might arise upon the facts of this case, upon this branch of it, there will be none when we connect it with the statute of Kentucky.

“When the nature of our conflicting titles,” says the supreme court of that State, “whether derived from the laws of Virginia or of this State, are considered, there is an apparent necessity of permitting the holder of the legal estate to call his adversary to the test when it cannot be otherwise reached. This act ought to be liberally expounded as a remedial statute.” *Cates v. Loftus*, 4 Mon. 439.

And in accordance with this view, that court decreed a release to one, having the legal title and possession from one who “pre-
[* 51] tended * a claim under a vague and void entry, without equity.” 1 Mon. 97.

And in another case, where the party in possession with title averred “that the defendants pretended to have a claim upon it, and thereby disparaged his title, and obstructed him in the full enjoyment of his property.” *Armitage v. Wickliffe*, 12 B. Mon. 488.

This statute is too important a portion of the law of property in Kentucky, to be disregarded in the exercise of the equitable powers of the courts of the United States in that State; and without affirming that it can be so fully applied under the constitution of those courts as by the state tribunals, we are satisfied that its protection may be properly invoked in cases like the present. *Clark v. Smith*, 13 Pet. 195. The statement of the plaintiff’s title shows that the lands described in his bill were sold as the property of the defendant, by a public officer, with legal process, issued upon valid judgments, and that the title of the purchasers have vested in him; that this title has been submitted to a court of law, and maintained in a succession of trials; that besides, the sureties who were bound for these judg-

ments, and to whom the lands were delivered by the defendant for their indemnity, with powers to use them for that purpose, have transferred them, to relieve themselves and their principal, to the grantors of the plaintiff; that, in addition, the son-in-law, agent, and attorney of the defendant, to preserve a portion of his estate for his family, has confirmed in his name the title of the plaintiff, as we are bound to believe, with the knowledge and acquiescence of his principal, and that family still retains the consideration of this deed; finally, that the plaintiff, and those whose title he has, has been in possession since 1824.

The defendant resists the suit of the plaintiff for relief, by a denial, in his answer, of the averment that he is a citizen of Texas, and consequently the jurisdiction of the court. 2. By the plea that, before this suit was commenced, he had instituted one in the circuit court of Bath, Kentucky, contesting the plaintiff's title and provoking a full investigation into its validity, and that he could not be restrained from its prosecution there. 3. That the sales by the marshal were invalid, and that the conveyance executed by Bascom in his name to the plaintiff, is void, for misrepresentation, fraud, and the want of consideration.

The doctrine of this court is settled, that when the jurisdiction of the circuit court appears, by proper averments, on the record, the defendant can only impugn it in a special plea. The 39th rule of practice for courts of equity in the United States, adopted by this court, excludes "matters of abatement, objections to the character of parties and to matters of form," from the answer, *and [* 52] confines its operation to "matters in bar, or to the merits of the bill." It is proper to say, that if the fact of citizenship was open to inquiry, the evidence sustains the allegation of the bill.

2. Whether we consider the commencement of the suit as dependent upon the filing of the bill with the clerk of the court, or the issue, service, or return of process upon it, there is no sanction in the evidence for the plea by the defendant of a prior suit pending in the circuit court of Bath county. The plaintiff's bill was filed and process issued before that of the defendant was entered, and the process from the court of the United States was executed more than a year before the service of a subpoena to answer, on the plaintiff. Nor are the imputations of fraud, oppression, and injustice, upon the conduct of the plaintiff, nor the charges that he acquired his titles by corrupt and champertous contracts, better supported. No evidence has been taken which authorizes the crimination of the plaintiff by such allegations, in any part of the complicated and involved controversies which he seeks by this bill to close.

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Our conclusion is, that the plaintiff is entitled to the relief he asks for, and that the decree of the circuit court must be reversed, and a decree entered here conformable to this opinion.

19 H. 898; 21 H. 202.

ISRAEL W. RAYMOND, Owner and Claimant of the Cargo of the Ship Orphan, consisting of 844 tons of coal, Appellant, v. WILLIAM TYSON, Libellant.

17 H. 53.

Under a charter-party for a voyage from London direct, or thence to Cardiff in Wales, to load for port or ports on the Pacific, where the vessel was to be employed between such ports as the charterers might elect, for the full term of fifteen months, with a privilege to the charterers to extend the time to twenty-four months, the hire being at the rate of \$2,000 a month, payable in New York, semiannually; *held*, the owners had not a lien on the outward cargo from Cardiff to the Pacific, for the first six months' hire of the vessel, which became due at New York before the arrival of the vessel at the port of delivery in the Pacific.

THE material facts, and the substance of the charter party and bill of lading, are stated in the opinion of the court.

Lord, for the appellant.

Cutting, contra.

[* 57] * WAYNE, J., delivered the opinion of the court.

This is an appeal from the district court for the northern district of California.

The suit was brought by a libel in the admiralty, against 844 tons of coal (of which Raymond was the claimant) on board the ship Orphan, of which Tyson, the libellant, was a part-owner. Its object was to enforce an alleged lien, on the coal claimed under a charter-party between Tyson and J. Howard and Son, of New York, charterers. The charter-party was made at New York, on the 1st February, 1850, the ship at that time being on her voyage to London. The whole ship, with the exception of the deck, cabin, and necessary room for the crew, and stowage of provisions, sails, and cables, was chartered by the owner to J. Howard and Son, for a voyage from London direct, or from thence to Cardiff, in Wales, (if required,) to load for a port or ports on the Pacific, where she was to be employed between such ports as the charterers might elect; thence to be returned back, either to New York or Great Britain, at their option. The time for her employment was to extend to the full term of fifteen months, with a privilege to the charterers to extend it to twenty-four months. The charterers engaged to

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* furnish the ship with a full cargo—bills of lading to be [* 58] signed for it without prejudice to the charter—and they contracted to pay to the owner of the ship or his agent, for the use of the vessel, at the rate of \$2,000 per month, commencing in London, if she proceeds thence direct to the Pacific, when ready to load, and notice of the same was given to the charterers or their agent. But if the vessel shall be ordered to Cardiff to load, then the charter was to commence from the time she might be ballasted, and be ready for sea, in London. In that case, the ship is to be allowed ten days from the time she is ready to sail from London, until her arrival at Cardiff, and only that time, for which the charterers were to pay, should the ship be a longer or shorter time in making the passage to Cardiff. It is agreed between the owner and the charterers that the charter should be payable in New York semiannually; the first payment to be made six months from the commencement of the same, and so every six months during the continuance of the charter, before the arrival of the ship and her being delivered back to the owner, in New York or Great Britain; or upon satisfactory proof of total loss of the ship, all moneys in arrears and due, up to the time of the loss, were to be paid on demand. Should the vessel be ordered to California, the charterers agree to pay the expense of victualling and manning her, attendant upon the California voyage, and the charter money for any detention caused by desertion of the crew. The charterers agreed also to pay all port charges of the ship incident to her employment, except victualling, manning, and repairs, and to advance funds for the ordinary expenses of the ship after she left Europe, which were to be deducted from the charter payments on vouchers from the captain.

The ship sailed for Cardiff, on the 1st April, 1850, and arrived there on the 14th April. She there took on board from Branson, Sands, and Co., the agents of the charterers, a cargo of 844 tons of coal, the property of the charterers. For this cargo, a bill of lading was signed, May 4, 1850, at Cardiff, expressing that the ship was bound to Panama, for orders, to be delivered to order or assigns, he or they paying freight, as per charter-party. The bill of lading is as follows:—

Bill of lading. Shipped in good order and condition, by Branson, Sands, and Co., of Liverpool, in and upon the good ship or vessel called The Orphan, whereof R. C. Williams is master for this present voyage, and now lying in the port of Cardiff, and bound for Panama for orders, eight hundred and forty-four tons of “Nixon’s Merthyr and Cardiff steam coal,” being marked and numbered as per margin, and are to

844 tons of “Nixon’s Merthyr and Cardiff steam coal.”

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[* 59] be delivered in the like * good order and condition, at the port, according to orders, (all and every the dangers and accidents of the seas, and navigation, of whatsoever nature or kind, excepted,) unto "order," or to assigns; he or they paying freight for the said goods, as per charter-party, with average accustomed.

The ship proceeded to Panama, with her cargo, and thence, by orders of the charterers, to San Francisco. She arrived at San Francisco, December 2, 1850, and the cargo was retained on board by her captain, to preserve an alleged lien upon it for freight. The libellant avers that \$12,000 was due for charter money, on the 1st October, and that it had not been paid by the charterers; and that they had not furnished funds for the ship's expenses after she left Europe; and for the money due he claims a lien upon the coal.

Raymond, the claimant, answers, that the bill of lading of the coal had been transferred to him at the time of its shipment by J. Howard and Son, for a valuable consideration paid; and this is not denied in the case. That he thereby became owner of the coal, and has ever since continued to be so, free from any lien or claim in favor of the owners of the ship, or any other persons; that he had demanded the coal, but that the master refused to deliver it. After the libel was issued, and the answer had been put in, the master of the ship petitioned for an order for the sale of the coal, as a perishable commodity. The order was granted, the coal was sold, and the proceeds were adjudged to be liable to a lien for the sum due upon the charter-party, on the 1st October.

We shall give our judgment upon the foregoing statement, without considering in detail the general principles governing contracts of affreightment. But we will state two of them, because they have a decisive bearing upon the charter-party, under which this controversy has arisen.

First, it must be remembered, that a charter-party is an informal instrument as often as otherwise, having inaccurate clauses, and that on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade. So Lord Mansfield said, a long time since. Abbott, in his treatise relative to merchant ships and seamen, Story's edition, 188, gives the rule of construction very much in the same words; but perhaps with more precision. "The general rule which our courts of law have adopted, in the construction of this as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates." Chancellor Kent, in his 47th

chapter, *on the contract of Affreightment, cites the [* 60] rule approvingly. The late Mr. Justice Thompson, of this court, asserts it in *Ruggles v. Bucknor*, 1 Paine, 358. Judge Story acted upon it ten years afterwards, in the case of *The Volunteer*, 1 Sumn. 551; and again in another case, 2 Sumn. 589. The first says: "It was pressed upon me by the defendant's counsel, that I should decide this abstract question, and lay down some general rules as to the lien on the cargo for the freight, when the voyage is performed under a charter-party. This I do not feel disposed to do, especially as it would and ought to be considered as a mere *obiter* opinion, if not required by the facts of the case. And, indeed, it is impracticable to lay down any general rules to meet the great variety of cases that must necessarily arise in commercial transactions. Each case must depend, in a great measure, upon its own circumstances. Parties are not bound to any fixed and precise stipulations, to be embraced in a charter-party." In the case of *The Volunteer* and cargo, the most difficult question was, whether there was, under the charter-party, a lien on the homeward cargo for the freight. Judge Story says: "In general, it is well known that by the common law there is a lien on the goods shipped for the freight thereon; whether it arise under a common bill of lading, or under a charter-party. But then this lien may be waived by consent; and in cases of charter-parties, it often becomes a question whether the stipulations are or are not inconsistent with the lien." The other case mentioned in 2 Sumn. 589, (certain logs of *Mahogany v. Richardson*,) was one which was decided upon the inaccurate and inconsistent stipulations of a charter-party, by a liberal construction of them, in furtherance of the real intention of the parties and the usage of trade. In *Gracie v. Palmer*, 8 Wheat. 605, 634, this court has said, "that the contract of affreightment, like any other contract, is the creature of the will of the parties. It may be varied to infinity, and easily adapted to the exigencies of either party or of any trade. It is only where the express contract is silent, that the implied contract can arise." These authorities are sufficient, without citing others, to establish the general rule for the construction of charter-parties.

The next rule for the construction of charter-parties, deduced by us from an examination of all the leading cases in the English and American reports, including those cited in the argument of the counsel of the appellee, is this: that though the owner of a ship, of which the charterer is not the lessee, but freighter only, has a lien upon the cargo for freight, properly so called, and also for a sum agreed to be paid for the use and hire of the ship, his lien may be considered as having been waived, without express words to that effect,

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[* 61] if there are stipulations in the charter-party * inconsistent with the exercise of the lien, or when it can fairly be inferred that the owner meant to trust to the personal responsibility of the charterer. In *Ruggles v. Bucknor*, Paine's Reports, 363, Mr. Justice Thompson said: "There can be no doubt that a ship-owner may, by express stipulations as to payment of freight, incompatible with a claim upon the cargo for the same, be deemed to have waived his lien; as if he should, by the charter-party or otherwise, agree to receive his freight at a time and place having no reference to the delivery of the cargo, or at variance with such time and place. But, as by the general rules of law, the cargo is liable for the freight, it should be satisfactorily shown that the claim has been relinquished before the ship-owner can be required to part with the cargo without payment of the freight." As early as the year 1820, Chief Justice Spencer had ruled the same in the case of *Chandler v. Belden*, 18 Johns. 157, 162. His language is: "The right to retain the cargo for the freight has grown out of the usage of trade; and it does not exist, nor can it be enforced, when the parties have expressly regulated the time and manner of paying the freight, by stipulations in a charter-party, and especially if the cargo is deliverable before the arrival of the periods of payment. Such an agreement is an express renunciation of the right to insist on freight before the cargo is delivered."

Judge Story says, in the case of *The Volunteer*: "But then this lien may be waived by consent, and in charter-parties it often becomes a question whether the stipulations are or are not inconsistent with the existence of the lien. For instance, if the delivery of the goods is by the charter-party to precede the payment or security of payment of freight, such a stipulation furnishes a clear dispensation with the lien for freight, for it is repugnant to it, and incompatible with it." Judge Story had had occasion to consider this point five years before he gave his opinion in the case of *The Volunteer*. We find in his note to his edition of *Abbott on Shipping*, printed by Hilliard, Gray, Little, and Wilkins, at Boston, in 1829, page 178, a citation of the case of *Chandler and Belden*, 18 Johns. 157, with this commentary: "That part of the language which seems to deny the right to retain, where there is an express stipulation of the time and manner of paying the freight, if it means that that fact alone overturns the lien, whether the stipulation be or be not inconsistent with such lien, admits of much question, and seems inconsistent with the doctrine of the cases cited in the text, as well as with that in *Chase v. Westmore*, 5 M. & Selw. 180, and *Crawshay v. Homfray*, 4 Barn. & Ald. 50."

In *Lucas v. Nockell*, 4 Bing. 729, it was said: "It may distinctly appear from the charter-party, that the owner has been conten-

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* to trust to the personal responsibility of the merchant, [* 62] and fixing a specific time of payment, before or after delivery, has waived his right to a lien. In *Lowell v. Simpson*, 16 Vesey, 275; *Chase v. Westmore*, 5 M. & Selw. 180; and in *Crawshay v. Homfray*, Barn. & Ald. 52, it was ruled, if there be a specific contract for a particular time and mode of payment, and that contract is inconsistent with the right to retain, it will of course defeat a claim to exercise it."

Nothing can be found in the cases cited by the counsel for the appellee, in conflict with the extracts just given: on the contrary, most of them admit the principles expressed in those extracts.

Gracie v. Palmer, in 8 Wheaton, the same case upon appeal to this court, decided by Mr. Justice Washington, in 4 Wash. C. C. Reports, affirms what no one will deny; if the ship-owner retains the possession of the ship, and the charterer is merely the freighter, that the former has a lien upon the cargo for freight. Other points were ruled in that case, but they have no bearing upon this, and especially none upon what shall be considered a waiver of a lien for freight. *Clarkson and Edes*, in 4 Cowen, is to the same point; but both Chief Justice Savage and Mr. Justice Woodworth decided that case from the intention of the parties, as that could be inferred from the charter-party.

Small and Moates, in 9 Bing. 574, decided by Chief Justice Tindal, was a case in which it was expressly agreed that the ship, during the continuance of the voyage, should remain firmly and fully vested in the owner, and that he should at all times during the voyage and service, have a complete lien upon the lading of the ship. It was ruled that he had a lien upon the goods of the charterer, and against his indorsee of the bill of lading. The grounds upon which the indorsee contended against the lien, need not be stated here, as they have no relation to any controversy in this case.

Saville v. Champion, much relied upon in 2 Barn. & Ald. 503, 512, decided by Chief Justice Abbott, does not interfere in any way with the rules of construction which we have stated to be applicable to charter-parties. The point ruled in that case was, that as there were no express words of demise of the ship itself, in the charter-party the freighter did not thereby become the owner for the voyage, and that the possession continued in the owner, and that he had therefore a lien upon the cargo for freight. But the lien on the goods, for the stipulated hire of the ship, is expressly put upon the ground "that there was nothing to show that the delivery of the goods was to precede the payment of that hire, in cash and bills, as provided

* for by the deed. The case of *Champion v. Colvin*, 3 Bing. [* 63] N. C. 17, involved, first, the inquiry whether or not the owner

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of the ship did not retain the possession of her, and that the charterer was only freighter. It was ruled that the owner was left in possession, the charter-party being the same on which the court of king's bench decided, in *Saville v. Champion*. Next, whether it was the intention of the parties that the ship-owner meant to insist on the delivery of the bills which were to be given on London before the delivery of the cargo; it was decided that he did; but that the decision was given upon the ground of the special agreement, and not on the general right of lien, is obvious from the language of the chief justice. "Looking to the intent of the parties, it is clear the ship-owner meant to insist upon the delivery of the bills before the delivery of the cargo, so that, with respect to the time at which the freight was payable, there was no difference between that and the preceding cases." And, lastly, whether or not the assignees of the charterer stood in a different relation to the owner from that of the charterer, it was ruled that he did not. The opinion given by Chief Justice Tindal, in this case, is manifestly not reported with accuracy as to the statement, and is apt to mislead in respect to the second ruling of that learned judge. It appears, then, that neither the case of *Saville v. Champion*, nor that of *Champion v. Colvin*, 3 Bing. N. C. 17, contains any thing against the second rule of construction which we have stated. There was not in either of the charter-parties of those cases, though London had been fixed upon for the place of payment, any thing incompatible with a lien upon the cargo, or at variance with the time and place which had been agreed upon for its delivery. Upon the authorities cited, we consider the rule to be, that though the owner of a ship who retains possession of her has a lien for freight upon the cargo of the freighter, the lien may be adjudged to have been waived without an express agreement, or words to that effect, if there are stipulations in the charter-party inconsistent with the exercise of such lien, or when it can be fairly inferred, from the language of the instrument, that the owner meant to trust to the personal responsibility of the charterer for the freight or hire of the ship.

The limitation upon such construction and inference, is as well expressed as it can be, in the language of Judge Story, in the case of certain Logs of Mahogany, 2 Sumn. 597. It is: "Let us now proceed to the consideration of the terms of the present charter-party, in order to ascertain what is their true meaning and interpretation. If, upon comparing the various clauses, we are led to the conclusion that it is doubtful whether the charterer was intended to [* 64] have the sole possession and control * of the brig during the voyage, or to be constituted owner for the voyage, then the general owner must be deemed such, for his rights and authorities

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over the voyage must continue, unless displaced by some clear and determined transfer of them." So we now say, if it be only doubtful in the construction of a charter-party whether the owner has waived his lien upon the cargo, he must have the benefit of that doubt; his lien being given by the force of the common law, which cannot be taken from him, "though there is a special contract, unless there is something in that contract inconsistent with that lien, or unless it is waived by fair implication." Williams, Justice; *Pinney v. Wells*, 10 Conn. 104, 115.

We will now turn to the charter-party in this case, and form our judgment accordingly, as the two rules of construction which have been stated shall bear upon it. In the first place, it is not for the carriage of a single cargo or for a voyage, but for a voyage from London direct, or from Cardiff, in Wales, to load for a port or ports in the Pacific, where the ship is to be employed between such ports as the charterers may elect; the time of employment in that way being for fifteen months certain, with the right of the charterers to extend it to twenty-four months. For such employment, the charterers agree to pay to the owner or his agent, at the rate of two thousand dollars per month, payable in New York semiannually, and so on every six months during the continuance of the charter. Now, if there be not something else in the charter to control the meaning of the words designating time and place for payment, it cannot be doubted that it was the intention of the owner and the charterers to make time and place substantial parts of their contract. This is not an inference of intention, but a declaration of it in words too intelligible for the use of interpretation. They have a fixed meaning, and cannot, of themselves, have any other meaning. That meaning, then, is the contract between the parties; precisely with the same obligation upon them as another stipulation would have, for the payment of money at a given time and place, in any other analogous mercantile contract. There are no qualifying words of those used to make them doubtful; nothing in the charter which can be applied to make them so. No fact could happen, from any stipulation in it, to make the time and place agreed upon for payment uncertain. Place for the payment of money is a substantial part of any contract to pay it there. It can be insisted upon by him who is to receive it, and cannot be rightfully refused or omitted by him who has it to pay. A broken promise of that kind gives to the creditor a right of action against the debtor for its recovery. Why, upon principle, should a promise to pay freight at a particular time, and at a place other *than that where the owner of the ship has under- [* 65] taken to deliver the cargo, be required to be paid elsewhere?

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It is the payer's privilege to pay it there. And, should it not be paid, why should the owner have more than a right of action for its recovery, or larger remedies, by suit, than are given in any other contract? We confess we do not see why. Place for the payment of freight, other than that for which the cargo is shipped and discharged, amounts to a stipulation that freight will not be demanded at the last, as a condition for the cargo's delivery. All of the authorities concur in this, that place for the payment of freight is a waiver of a lien upon the cargo, unless there are already circumstances or stipulations to show that it could not have been meant. It is so, because it is at variance with the enforcement of such a lien, according to the usage of trade; and it is so, because, when parties to a charter-party depart from that usage, by agreeing to pay and receive freight at another place than that where the common law gives to an owner of a ship a lien to enforce payment, it must be regarded that the owner had some sufficient reason for not insisting upon his right, according to the common law.

But it was urged by the counsel for the appellee, with earnestness and ingenious ability, that it might be shown that the time and place fixed for the payment, under the charter, was not meant by the owner to be a waiving of a lien. That it had no other effect than to fix the periods of payment, and to suspend the right to enforce a lien upon the cargo until default of payment. Time only might do that, but place connected with time for payment does not.

It was said that the cargo which the charterers agreed to furnish the ship, and which was put on board of her, to be carried from Cardiff to the Pacific, and that the clause in the charter, that bills of lading were to be signed without prejudice to it, in connection with the fact that, according to the ordinary length of such a passage, the ship could not have made it before the first payment would have become due, indicated the owners' intention to retain a lien upon the cargo, as an additional security for the first payment. It may have been that the owners had such a purpose in view, apart from the changed condition of the charterers, when payment was not made in New York; but we are sure, from its inconsistency with the chartered employment of the ship, that the charterers never contemplated it. The ship was to load with a full cargo, at London or Cardiff, for a port or ports in the Pacific, to be employed between such ports as the charterers might elect. She was not loaded for a specific voyage to any particular port, where the cargo was to be discharged, but it was to be discharged at one or more ports,
[* 66] as it might have been their interest to direct. The ship sailed from Cardiff to Panama, for orders, with a cargo to

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be delivered "according to orders." Such is the language of the bill of lading, (exactly in conformity with the charter-party,) signed at Cardiff, on the 4th May, 1850, thirty-four days after the ship's hire is said to have commenced. When she arrived at Panama is not shown, but when she arrived at San Francisco the first payment had become due; and when it was learned there that it had not been paid in New York, her captain refused to discharge the cargo, according to orders, unless payment was made, or security had been given for the freight; in that way, demanding money at San Francisco, which was only payable in New York, or that security should be given for it; neither of which has been provided for in the charter-party, in the event of a default of the first payment. By doing so, he took the ship out of her employment, which had then seven months to run, and disabled the charterers from using her in the only way for which she was chartered. It is no answer to say that his act and its consequences were occasioned by the default of the charterers to make the first semiannual payment. They had at that time rights for a longer service of the ship, and it had not been agreed that their default should either interrupt or terminate them. The lien, as claimed and enforced, raised uncertainties in the relations of the parties not anticipated by either, and at variance with the rights of both. If it had been meant that such a lien should be enforced, it certainly had not been provided upon which of them the loss should fall for the time that the ship would be withheld from her employment; whether or not the owner should make an allowance for it out of the monthly hire of the ship, or that the charterers should continue to pay it whilst she was not in their use or under their control. Such uncertainties, changes of relations between the parties, and consequences, are stronger against the lien claimed than any inferences can be in its favor, which are made from the engagement of the charterers to furnish a cargo, or from the clause in the charter that bills of lading were to be signed without prejudice to it, or from the fact asserted that the ship could not arrive until after the first payment had become due.

Whether or not the delay in her arrival would have been, as it is said the owner anticipated it would be, we do not know; but we do know that the bill of lading was signed on the 4th of May, 1850; that there were then one hundred and forty-six days before the first payment would become due, for her to make the passage, and it is not so certain that it might not have been done, as that the contrary can be assumed to give any force to the suggestion that the cargo had been stipulated for and furnished, *to give addi- [* 67]
tional security to the owner by a lien, should there be a

failure to make the first semiannual payment. There is too much of indirectness and covert intention in such an anticipation, for us to countenance it. The cargo was obviously put on board as an adventure for profit. Without it, the time it would have taken to make the passage to the locality of the ship's principal employment, for which the charterer was paying at the rate of two thousand dollars per month, would have been a dead loss at least of five months of the time of her charter, or of ten thousand dollars. It cannot be supposed that the charterers were so blind to their interest as to permit that, or that it was not their own interest which prompted them to furnish the cargo without any intention of giving to the owner an opportunity to assert a lien for securing money which they had promised to pay in New York.

Further, the declaration that the time and place fixed for payment was a suspension of the lien, is an admission, if the ship had arrived from Cardiff in time for the discharge of the cargo before the first payment became due, that the owner meant it should be done without being subject to a lien for freight. It was certainly meant that the cargoes which the ship might have carried from port to port in the Pacific, between the intervals when payments were to be made, were to be discharged and delivered without being subject to a lien for freight. It must have been then the owner's intention that all of the cargoes which the ship might carry were to be exempt from a lien, except that which she might have on board when the payment occurred. There is not in the charter any such distinction between them, or any thing looking like the reservation of such a right. Unless that can be made to appear, the engagement of the owner to release a lien upon all other cargoes, and that they were to be discharged before the payment of freight, does not permit the exception of any one of them from that engagement. All of the authorities declare that the owner's consent to receive freight before the cargo is delivered, whether it shall be paid or not, is a waiver of a lien upon the cargo; and that such a waiver may be inferred from a time and place having been agreed upon for the payment of freight, which has no reference to the place where the cargo is to be discharged.

But we will take the case as it was; that the ship did not arrive until after the time fixed for the first payment, that it was not paid, and that on such account the lien was claimed. It does not make the claim stronger. Had it been meant that non-payment should give the lien, it should have been so stipulated. The non-arrival of the ship cannot give to the default any additional support [* 68] for a lien. The lien here was asserted, not * in virtue of the law giving a lien upon cargo, but upon incidents out of

the charter, which it is said gave to the owner a lien upon the contingency of their happening. Such a contingent or conditional lien may be agreed for by the owner and the charterer of a ship; but it must be done in terms leaving no doubt about it; or it must be a clear case of inference to prevail against time fixed for the payment of freight at a place where the cargo is not to be discharged. The charter-party is to be construed liberally, for the purpose of preserving a lien given by the law, if the manner of it shall be only a matter of doubt. But that doubt cannot be helped by contingencies outside of the charter-party not plainly anticipated or growing out of one of its stipulations. Charter-parties are so frequently inaptly and incautiously drawn, that they may be said almost to have the indefiniteness of commercial guarantees. The language of this court upon the trial of one of the last is applicable here.

“Letters of guarantee are written by merchants, rarely with caution and scarcely ever with precision. They refer, in most cases, as they do in the present, to various circumstances and extensive commercial dealings in the briefest and most casual manner, without regard to form.” The same may be said of charter-parties. “Though they have usually a printed form for a basis, they are often filled up by ship-brokers and merchants, with little caution, and without much attention to a perception of the fitness or unfitness of that form to the special circumstances of particular cases.” It is to be expected, then, that there will be in them unprecise and inconsistent stipulations, which must have, as other mercantile contracts usually receive, a liberal construction in furtherance of the intentions of the parties and the usage of trade. But we do not know a point in commercial law upon which the reported cases are more in conflict. It is said by the last English editor of Lord Tenterden’s Treatise, that on a review of the decisions respecting the ship-owner’s lien for freight, it is impossible not to regret the uncertainty introduced by their almost irreconcilable conflict with the construction of contracts of charter-parties. The courts of America, in the adoption of our refinements, have reaped for their mercantile communities all the uncertainties attending them: and there and here, as the law now stands, it will be useful for the ship-owner to remember that, although the exercise of his lien may be upheld in cases of doubtful construction, an express contract is the surest and strongest ground upon which that light can rest; and that, by inserting an agreement respecting it in the charter-party, the parties to it may, between themselves, obviate all difficulty upon the subject.

It is certainly to be regretted that such should have been the *uncertainty, in both countries, upon so important a [*69]

point of commercial law. One of our objects in this opinion has been to produce more uniformity of construction hereafter. We thought it would be best done by establishing, from adjudicated cases, and only from such, those rules for the construction of charter-parties, and other contracts of affreightment, which are most frequently needed in trials upon them in courts. One of them we will repeat, in the language of Lord Tenterden. The general rule which our courts of law have adopted in the construction of charter-parties, as well as other mercantile instruments, is, that the construction shall be liberal, agreeable to the intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. Another rule drawn from the cases cited in this opinion is, if the owner of a ship stipulates to receive her freight at a time and place, having no reference to the place for the delivery of the cargo, or at variance with such time and place, he is to be considered as having waived his lien.

Both of these rules of construction are applicable to this case. The owner's agreement to receive the hire of the ship at intervals of six months, and in the city of New York, during the continuance of the charter-party, has no reference to the place at which the cargo was to be delivered, and is at variance with the right which the charterer had to fix the time and place for such delivery. The owner, then, is considered by us as having waived his lien upon the cargo for freight. We shall, therefore, reverse the judgment of the court below, and decree a dismissal of the libel, with directions that further proceedings in the case shall be in conformity with this opinion.

Campbell, J., and Grier, J., dissented.

CAMPBELL, J. I dissent from the opinion of the court; and, as the question is one of importance, I think it proper to record the reasons for the dissent.

The parties agree that the contract of affreightment, between the libellant and Howard and Son, did not displace the owner from the control and possession of the ship for any portion of the term of its duration.

When the master arrived at San Francisco, with the vessel, he found the first instalment of the freight money due and unpaid, and that he was in the lawful possession of a cargo, shipped according to the charter-party, for the voyage which was then completed. The

coexistence of such a debt with the lawful possession of
[*70] such property, form the conditions upon which a *lien de-

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pend; and the owners claim to detain the property as a security for the debt, and which must be allowed, unless he has defeated it by some obligation indicative of its "determinate abandonment." The claimant supposes that the evidence of such a contract exists in the charter-party.

Holt, in his work on Shipping, part 3, c. 6, § 63, upon a review of the cases, concludes "that the language of a charter-party must be very strong, indeed, to exclude, under any circumstances, the lien of the owner. This right, being both legal and equitable, the courts are naturally disposed to favor it, and not to impair or diminish its exercise, except under circumstances where it would be unreasonable to enforce it, and contrary to the intention of the parties." And further, "that the owner's right of lien is so far favored in law, that whilst he keeps possession, by his master and crew, it can only be excluded by the most express and absolute terms, or by a necessary implication from the contract." And so are adjudged cases. *Saville v. Champion*, 3 Bing. N. C. 17; *Gladstones v. Allen*, 12 C. B. R. 202; 1 Sumn. 551; 2 H. 597. There is no express stipulation in this contract to defeat the lien of the libellant, and the case of the claimant, therefore, depends upon the discovery of an article wholly incompatible with its existence.

Lord Tenterden, discussing clauses of a charter-party that affect a lien, says: "The right may exist, if it appear from the instrument in any way that the payment is to be made in cash or bills before, or at the delivery of the cargo, or even if it does not appear that the delivery of the cargo is to precede such payment;" and "that when the payment is to be made by bills, the right of retention continues till they are given, and would, it is now conceived, revive, in case of their dishonor, before the ship-owner has parted with the goods." And so are adjudged cases. *Abb. Ship.* 299; 1 *Dans & Ll.* 193; 1 *Maule & S.* 535; *Cross on Lien*, and cases cited, 311. The circumstances that appear in the record seem to bring this case fully within the operation of these principles. It is not shown that the voyage from Cardiff to Panama "for orders," and the voyage from Panama to San Francisco, pursuant to orders, were otherwise than in strict accordance with the calculations of the parties. The cargo taken at Cardiff, by contract, did not reach San Francisco until after the first instalment for the use of the vessel, upon these voyages, became due, and advices from New York had been received at San Francisco of the default of the shipper.

That a right should arise for the detention of the cargo, until the freight was paid, would seem to follow, from the principles before stated.

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But it is said that their having been no express reservation [*71] * of a lien, and the owner having consented to receive his money in New York, by instalments, present conditions inconsistent with the existence of a lien.

The reply is, that the commercial law does not exact a stipulation to support the lien of the ship-owner, but requires circumstances expressive of "a determinate abandonment," as the condition of its removal; no deduction can, therefore, be legitimately drawn from the silence of the contract. And the requisitions for payment in New York, by instalments, show that the owner had some confidence in the personal responsibility of Howard and Son, and did not rely exclusively upon the profits of the adventure, or the security of the cargo; but they cannot fairly be held to establish any renunciation or determinate abandonment of the remedies the law affords, in case of their default. And this evidence of a waiver of the lien, imperfect as it is, is still more impaired by the facts, that though the amount of the freight did not depend upon the lading of the vessel, but was payable in any event; and though a full cargo for so long a voyage could not fail to injure the vessel, nevertheless, the owners stipulated that a "full cargo of lawful merchandise" should "be provided," and bills of lading signed without prejudice to the charter.

I admit that, after the completion of her first voyage, and after the arrival of the vessel at San Francisco, and she had then entered upon the coasting trade between ports on the Pacific, cases may be put where a cargo might not be subject to a lien; and others, where the libellant would find embarrassment in enforcing one. But this case involves no difficulty. And to allow the lien, will be, in my opinion, a consistent application of familiar and well-settled principles of commercial law.

I am authorized to say Grier, J. concurs in this opinion.

5 Wal. 545.

THE TROY IRON AND NAIL FACTORY, Appellant, v. GEORGE ODIORNE, JR., and FRANCIS ODIORNE.¹

17 H. 72.

A question of fact as to the date when a machine was constructed.

APPEAL from the circuit court of the United States for the district of Massachusetts.

George T. Curtis, for the appellant.

No counsel *contra*.

¹ Curtis, J., having been of counsel, did not sit in this cause.

* CATRON, J., delivered the opinion of the court.

[*73]

Henry Burden obtained a patent, in 1840, for a machine to make hook-headed spikes. He applied for the patent on the 18th of April, 1839. It was assigned to the Troy Iron and Nail Company, who filed a bill against the Odiornes, to enjoin them, and for an account for using a machine to make similar spikes; and which machine, it is alleged, infringed the monopoly secured to Burden, by his patent of 1840. The case was brought to a hearing on the following stipulation:—

“The defendants agree not to deny the validity of the complainant’s patent, provided they make out their title to the said letters-patent to be good.

“They also agree not to deny that the machine complained of in the complainant’s bill, is an infringement on the patent granted to H. Burden, on August 4, 1840.

“If the complainants shall establish their title to the letters-patent aforesaid, the proper decree may be entered for the complainants, unless the defendants shall prove that the spike machine used by them, and complained of in the bill aforesaid, was constructed prior to the alleged application of H. Burden, made April 18, 1839, for letters-patent therefor, according to the provisions of the statute of the United States, 1839, c. 88, § 7;¹ or was the result of an independent, original invention, prior in time to the invention of the said Burden; in either of which cases the proper decree shall be entered for defendants.”

The only question presented for our consideration on the stipulation, is, whether the machine employed by the appellees was constructed prior to the 18th of April, 1839, when Burden made application at the patent-office, for his patent.

The machine complained of was built by Richard Savary, for the Boston Iron Company, in the spring of 1839, and obtained, by the appellees, by assignment. Savary was the patentee of a machine to make ship and boat spikes, and, at the suggestion of the agents of the Boston Iron Company, added an attachment of an apparatus to make a hook-head to spikes; the process for making which, Savary deposes he discovered in August, 1838. The time at which this apparatus was attached to the machine, (substantially complete in its operative parts,) is the time when the machine complained of was “constructed,” in the sense of the stipulation; it not being necessary that the machine should be geared and doing work. We are satisfied that it was set up, and substantially finished, before the 18th of April, 1839, and, therefore, order the decree below to be affirmed.

¹ 5 Stats. at Large, 354.

JOSEPH BATTIN, Patentee, and SAMUEL BATTIN, Assignee, Plaintiffs in Error, v. JAMES TAGGERT, Defendant in Error. JOSEPH BATTIN, Patentee, and SAMUEL BATTIN, Assignee, Plaintiffs in Error, v. ROBERT RADCLIFFE and JOHN JOHNSON, Defendants in Error. JOSEPH BATTIN, Patentee, and SAMUEL BATTIN, Assignee, Plaintiffs in Error, v. JOHN G. HEWES, Defendant in Error.

17 H. 74.

Where a patentee invented an apparatus for breaking coal, and combined it with an apparatus for screening coal which he did not invent, and took a patent for the combination only, and afterwards took a patent for the breaking apparatus and then surrendered both patents and took one for the breaking apparatus alone; *Held*, that his describing and not claiming the breaking apparatus in his first patent, and the surrender and cancellation of the second, did not deprive him of his right to a patent for the breaking apparatus

THE case is stated in the opinion of the court.

Keller and Dallas, for the plaintiff.

St. George T. Campbell, contra.

[* 80] * M'LEAN, J., delivered the opinion of the court.

This case is before us, on a writ of error to the circuit court for the eastern district of Pennsylvania.

The action was brought for the infringement of a patent. The jury, under the instructions of the court, found a verdict for the defendant. Exceptions were taken to the rulings of the court, which present the points of law for consideration.

On the 6th of October, 1843, Joseph Battin obtained a patent for the invention of a new and useful improvement in the machine for breaking and screening coal.

After describing the different parts of the machine, he sums up by saying: having thus fully described the nature and operation of my machine for breaking and screening coal, what I claim as new therein, and desire to secure by letters-patent, is, the manner in which I have arranged and combined with each other the breaking rollers and the screen; the respective parts being formed and operating substantially as herein set forth and made known.

An improvement to the above machine, by adding an auxiliary roller, was patented to Battin, 20th January, 1844. And on the 12th of February, 1844, another patent was granted to him for a
[* 81] * new and useful improvement in the machine for breaking coal.

In his specification, he says that he had made a new and useful improvement, in the manner of combining and arranging the toothed

rollers used in the machine for breaking coal, which rollers, as combined and arranged by me, are described as follows, in the specification attached to letters-patent, for a machine for the effecting, simultaneously, the breaking and screening of coal, granted to me under date of the 6th day of October, 1843. The breaking part of my machine consists of two rollers of cast iron, the peripheries of which are provided with teeth so placed as that, in the revolution of the rollers, the teeth of each of them shall stand opposite to the spaces formed by two contiguous teeth on the opposite roller. These rollers are geared together, in order to preserve the same relative position.

In the above-named letters he says: The manner of arranging and combining the toothed rollers was not made the subject of a claim, the said patent having been obtained for the combining of a roller-breaking machine, with a screen for separating the coal into the different sizes required; but as the breaking rollers, so formed and arranged and combined, are applicable to the ordinary cylinder-breaking machine, when not used in combination with a screen; and as I have found, by continued experiment, that such rollers constitute a real improvement in any breaking machine, I have determined to secure to myself the benefit of such improvement, in a distinct and separate patent therefor. Rollers for the breaking of stone, of ores, of coal, of corn, and of other substances, have been frequently constructed, and are well known, &c.

And, he adds, having thus fully described the nature of my improvement in the manner of combining and arranging the toothed rollers used in the machine for breaking coal, what I claim therein as new, and desire to secure by letters-patent, is, the so forming and gearing of such rollers, as that the teeth of one of them shall always be opposite to a space between the teeth in the other, whenever they are operating upon the article to be broken; the same being effected substantially in the manner herein set forth.

And afterwards, on the 4th of September, 1849, the said Joseph Battin obtained a patent, in which it is stated that he had invented a new and useful machine for breaking coal, for which letters-patent were granted to him, dated October 6, 1843, to which was added an additional improvement, dated 20th January, 1844, and, said letters having been surrendered by him, the same have been cancelled, and new letters-patent have been ordered to issue to him, on an amended specification. * He also surrendered the patent [* 82] granted to him the 12th of February, 1844, for an improved machine for breaking coal, which patent is hereby cancelled, but not reissued, &c.

After describing the invention, he sums up by saying: "What I

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claim, therefore, as my invention, and desire to secure by letters-patent, is the arrangement of the teeth on the two rollers, substantially as herein described, so that in their relation, the teeth of one shall come opposite the spaces between the teeth of the other, with sufficient space between to hold lumps of the required size, the rollers being so combined in gearing as to make them rotate in opposite directions, and, with the required velocities, to retain the relative position of the teeth of the two rollers, as described."

In the 6th section of the patent act of 1836,¹ it is declared that, "before any inventor shall receive a patent, he shall deliver a written description of his invention, in such full, clear, and exact terms, as to enable any person skilled in the art of science to which it appertains, to make and construct the same; and in case of any machine, he shall fully explain the principle, and the several modes of the application of the machine, so that it may be distinguished from other inventions; and shall particularly specify and point out the part, improvement, or combination, which he claims as his own invention or discovery."

And, by the 13th section of the same act, it is provided: "That when a patent shall be inoperative or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, &c., to cause a new patent to be issued to the said inventor, for the same invention, for the residue of the period then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification. And the patent so issued shall have the same effect and operation in law, on the trial of all actions hereafter commenced, for causes subsequently accruing, as though the same had been originally filed in such corrected form before the issuing of the original patent."

In his charge to the jury, the district judge said: "The case of *Battin v. Clayton*, which was before us some time ago, grew out of an alleged infraction of this patent, of 1843. We held, on the trial of that case, that the patent being merely for the combination of machinery, it could neither be supported nor *assailed by proof of the novelty, or want of novelty, of the parts. The patent was thereupon surrendered, and a new one issued, on the 4th of September, 1849, under an amended specification,

¹ 5 Stats. at Large, 119.

which described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only."

And he remarks: "It is said that the present defendants are using the apparatus described in this reissued patent, and that they should be mulcted in damages accordingly." But there are two legal positions of a general character, which appear to me to bar the plaintiff's right of recovery. They are these:—

1. That a description by the applicant for a patent of a machine, or a part of a machine, in his specification, unaccompanied by notice that he has rights in it as inventor, or that he desires to secure title to it as a patentee, is a dedication of it to the public.

2. That such a dedication cannot be revoked after the machine has passed into public use, either by surrender and reissue, or otherwise.

The above instructions, we think, were erroneous.

Whether the defect be in the specifications or in the claim, under the 13th section above cited, the patentee may surrender his patent, and, by an amended specification or claim, cure the defect. The reissued patent must be for the same invention substantially, though it be described in terms more precise and accurate than in the first patent. Under such circumstances, a new and different invention cannot be claimed. But where the specification or claim is made so vaguely as to be inoperative and invalid, yet an amendment may give to it validity, and protect the rights of the patentee against all subsequent infringements.

So strongly was this remedy of the patentee recommended, by a sense of justice and of policy, that this court, in the case of *Grant v. Raymond*, 6 Pet. 218, sustained a reissued and corrected patent, before any legislative provision was made on the subject. In that case, the chief justice said: "It will not be pretended that this question is free from difficulty. But the executive departments, it is understood, have acted on the construction adopted by the circuit court, and have considered it as settled. We would not willingly disregard the settled practice, in a case where we are not satisfied it is contrary to law, and where we are satisfied it is required by justice and good faith." The same principle was sanctioned in the case of *Shaw v. Cooper*, 7 Pet. 310.

How much stronger is a case under the statute, which secures the rights of the patentee by a surrender, and declares the effect
* of the reissued and corrected patent? By the defects pro- [* 84]
vided for in the statute, nothing passes to the public from the specifications or claims, within the scope of the patentee's invention. And this may be ascertained by the language he uses.

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In the case of *Stimpson v. The West Chester Railroad Company*, 4 How. 380, it was held that, "where a defective patent had been surrendered, and a new one taken out, and the patentee brought an action for a violation of his patent right, laying the infringement at a date subsequent to that of the reissued patent, proof of the use of the thing patented, during the interval between the original and renewed patents, will not defeat the action." In the same case, it was also held that the proceeding before the commissioner, in the surrender and reissue of a patent, is not open for investigation, except on the ground of fraud.

The patent of 1843 was not surrendered on the obtainment of the patent of 1844. That was intended to be a new invention of arranging and combining the toothed rollers, which, the patentee says, was not made the subject of a claim in the patent of 1843. The patent of 1844 was cancelled, but not reissued, when the patent of 1849 was issued. At that time, the patent of 1843, and the improvement thereon, dated January 20, 1844, were surrendered and cancelled, and new letters-patent were issued on an amended specification.

The cause of the surrender of the patent of 1843, as stated in the charge to the jury, was the ruling of the court in the case of *Battin v. Clayton*, and that the amended patent of 1849 was consequently obtained. That ruling is not now before us, nor is it necessary to inquire whether the patent of 1843, on the specifications and claim, was sustainable. The plaintiff, by a surrender of that patent, and the procurement of the patent of 1849 with amended specifications, abandoned his first patent, and relied wholly on the one reissued. The claim and specifications in this patent, as amendatory of the first, were within the 13th section of the act of 1836. It is said, with entire accuracy, in the charge, in regard to the amended specification of the patent of 1849, that it "described essentially the same machine as the former one did, but claimed, as the thing invented, the breaking apparatus only." And this the patentee had a right to do. He had a right to restrict or enlarge his claim, so as to give it validity, and to effectuate his invention.

In the argument, the counsel very properly considered the patent of 1844 as not in the case. It was designed to secure a new combination, not included in the first patent; and, as the patent [* 85] of 1844 was surrendered and cancelled, and not reissued, *it being equally disconnected with the patent of 1843, and the reissued and corrected patent of 1849, it can have no effect on the claim of the plaintiff.

We think the court also erred in saying to the jury: "We instruct you that your verdict, in each case, must be for the defendants."

United States v. Sixty-seven Packages of Dry Goods. 17 H.

This, as well as the two instructions above noticed, took from the jury facts which it was their province to examine and determine. It was the right of the jury to determine, from the facts in the case, whether the specifications, including the claim, were so precise as to enable any person skilled in the structure of machines, to make the one described. This the statute requires, and of this the jury are to judge.

The jury are also to judge of the novelty of the invention, and whether the renewed patent is for the same invention as the original patent; and they are to determine whether the invention has been abandoned to the public. There are other questions of fact which come within the province of a jury; such as the identity of the machine used by the defendant with that of the plaintiff's, or whether they have been constructed and act on the same principle.

The judgment is reversed, and the cause is remanded to the circuit court for further proceedings.

**THE UNITED STATES, Plaintiffs in Error, v. SIXTY-SEVEN PACKAGES
OF DRY GOODS. JULES LEVOIS, Claimant.**

17 H. 85.

The sixty-sixth section of the collection act of 1799, (1 Stats. at Large, 677,) is not repealed by the nineteenth section of the tariff act of 1842, (5 Stats. at Large, 565,) nor by the eighth section of the tariff act of 1846, (9 Stats. at Large, 43.)

Repeals, by implication, of revenue and collection laws, not favored.

THE case is stated in the opinion of the court.

Cushing, (attorney-general,) for the plaintiffs.

No counsel *contra*.

* NELSON, J., delivered the opinion of the court. [* 90]

This is a writ of error to the circuit court of the United States for the eastern district of Louisiana.

A libel of information was filed in the district court, by the collector of the port of New Orleans, on behalf of himself and the United States, for the condemnation and forfeiture of sixty-seven packages of goods, on account of an alleged fraud upon the revenue, charging, among other things, in the information, * that the [* 91] goods were entered at the custom-house upon the production of an invoice, in which they were invoiced at a less sum than the actual cost thereof at the place of exportation, with a design to evade the duties.

On the trial, after evidence was given on the part of the libellants, tending to prove the facts charged in the information, the court charged the jury that the 66th section of the duty act of 1799 was repealed by force of subsequent statutes, and that, at present, there was no law in existence providing for a forfeiture of the goods for the causes set forth in the libel. The jury found accordingly for the claimant.

This ruling was carried up on error to the circuit court, where the judgment was affirmed.

The 66th section of the act of 1799, so far as it is material in the case, is as follows:—

“That, if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, &c., or the value thereof, to be recovered of the person making the entry, shall be forfeited.”

It was held in the case of *Wood against the United States*, 16 Pet. 342, which was an information founded upon this section, that it was then in force, and the property there seized was condemned under it. The goods in that case had been entered at the custom-house in 1839 and 1840. The duty act of 1842, which has since been passed, is supposed to operate a repeal of the section, by implication.

The 19th section of that act is mainly relied on, which is as follows:—

“That, if any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States, any goods, &c., subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out, or pass, or attempt to pass, through the custom-house, any false, forged, or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of misdemeanor, &c., punishable by fine and imprisonment.”

The invoice mentioned in the two sections (the 66th and 19th) is a very important document in the entry and passing of goods at the custom-house.

The 36th section of the act of 1799 made it the duty of the person making the entry, to produce to the collector the original invoice, in the same state in which it was received; and also to make oath

that it was the true, genuine, and only invoice received,
[* 92] * and was in the actual state in which it was received, and
that the deponent did not know of any other invoice or ac-

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count of the goods different from that produced. And the 1st section¹ of the duty act of 1818 further provided, that no goods subject to duty should be admitted to entry, unless the original invoice of the same was presented to the collector. The same provision is found in the 1st section of the act of 1823.²

The 4th section of the last act also prescribes the oath substantially like the one in the act of 1799, above referred to, except somewhat enlarged.

The 4th section of the act of 1830,³ in the case of goods subject to duty, provided, that if any package should be found to contain an article not described in the invoice, the same should be forfeited. This provision is modified by the 21st section of the act of 1842, which saves the forfeiture, if the appraisers shall be of opinion that the omission in the invoice was not with a fraudulent design.

This brief reference to the several acts is sufficient to show the great importance attached to this document, in securing the collection of the proper duties upon foreign importations, and the great care that has been taken to insure the production to the collector of the true, genuine, original one, and that it should be in the actual state and condition in which it was received by the owner, consignee, or agent making the entry.

Now, the 66th section of the act of 1799, dealing with this documents, forfeits the goods of the party entered at the custom-house, "if not invoiced according to the actual cost thereof at the place of exportation, with a design to evade the duties."

The 19th section of the act of 1842 subjects the party to a misdemeanor, and punishable as such, concerned in making an entry, who, with intent to defraud the revenue, "shall make out, or pass, or attempt to pass, through the custom-house, any false, forged, or fraudulent invoice."

The former section has reference to the invoice so far as material to determine the forfeiture, simply with a view to the actual cost of the article at the place of exportation, without regard to the question whether the document itself is the true and genuine one or not. If the goods described in the invoice are invoiced under the cost value, with the design stated, the forfeiture takes place. The object is to prevent frauds upon the revenue in passing goods through the custom-house, by means of this device, at an undervaluation.

The latter provision is different, and has reference to the frauds that may be committed in passing or attempting to pass the goods upon the production of invoices not genuine; not the true, original

¹ 3 Stats. at Large, 433.² Ib. 729.³ 4 Ib. 410.

invoices, but those made out for the occasion, with a design to impose upon the collector and other officers.

[* 93] * The acts of 1799 and 1823 sought to prevent this species of fraud, by requiring the production of the original invoice, with the oath of the party superadded, that it was the true, genuine, and the only one received, and in the actual state in which it was received. This, although the party was subjected to the penalty of perjury in case of false swearing, seems not to have afforded the necessary protection; and the present provision, for the first time, has been enacted, subjecting the person to a misdemeanor, who shall, with intent to defraud the revenue, "make out or pass, or attempt to pass, through the custom-house, any false, forged, or fraudulent invoice," manifestly directed against the production and use of simulated invoices, and those fraudulently made up for the purpose of imposing upon the officers in making the entry.

The whole scope of the section confirms this view. It first makes the smuggling of dutiable goods into the country a misdemeanor; and, secondly, the passing or attempt to pass them through the custom house, with intent to defraud the revenue, by means of false, forged, or fraudulent invoices; the latter is an offence which, in effect and result, is very much akin to that of smuggling, except done under color of conformity to the law and regulations of the customs.

In the interpretation of our system of revenue laws, which is very complicated, and contains numerous provisions to guard against frauds by the importers, this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication, where a subsequent one has made provision upon the same subject, and differing in some respect from the former, but have been inclined to uphold both, unless the repugnancy is clear and positive, so as to leave no doubt as to the intent of congress; especially in cases where the new law may have been auxiliary to and in aid of the old, for the purpose of more effectually guarding against the fraud. This is the doctrine to be found in the case of *Wood v. The United States*, already referred to, and in several subsequent cases. 3 How. 197; 16 *ibid.* 150.

It has been supposed that the 8th section of the present act of 1846, which imposes an additional duty of twenty per centum for undervaluation, works a repeal of the 66th section of the act of 1799. But this provision has been part of the revenue system ever since the act of 1818, with the exception of a few years, and has never been understood to have the effect claimed. On the contrary, the section has been regarded as in force, and has been in practical operation during all this time, notwithstanding the imposition of other additional duty.

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It was so considered in the case of *Wood v. The United States*. This additional duty is imposed in case the appraised value exceeds * the invoice price of the goods ten per centum, irrespective of the question of fraudulent intent. [* 94] Undoubtedly, if this additional duty has been levied upon the goods by the government, it cannot forfeit them under the 66th section; but, if the collector is satisfied that the undervaluation in the invoice has been made with intent to evade the duties, instead of levying the additional duty, a forfeiture may be declared. It will be observed, also, that the forfeiture may be declared in cases of undervaluation, where it is less than ten per centum of the invoice price, provided the fraudulent design exists.

We are satisfied that there is no provision in the act of 1842, or in any of the duty acts, operating as a repeal of the 66th section of the act of 1799, but that it still exists in full force and effect. The judgment of the court below must, therefore, be reversed, and record remitted for further proceedings, in conformity to this opinion.

CAMPBELL, J., dissented.

This court, in a series of cases arising upon a succession of frauds perpetrated by a combination of persons in England and this country, determined that the 66th section of the act of 1799, and the 4th section of the act of 1830, as modified by the 14th section of the act of 1832,¹ were not repugnant, but formed a harmonious system for the prevention of frauds upon the revenue. 16 Pet. 342; 3 How. 211; 4 *ibid.* 242, 251.

The system formed was: 1. By the act of 1799, if an invoice contains goods that are undervalued, with design to evade duties, the goods so undervalued are forfeited. 2. By the acts of 1830 and 1832, if a package or invoice is made up with intent to defraud the United States, the package or invoice thus made up is forfeited.

The court, in its opinions, declared that the latter statutes apply only to the cases in which the fraudulent acts of the importer were discovered by the officers of the customs, in the opening and examination of the goods, in their transit through the custom-house; while the act of 1799 applies to the case of completed entries under false invoices, no matter when or where the detection took place, the suits were all for forfeitures where the goods had passed through the custom house, with a regular entry and payment of duties, but upon false invoices, that is, importing on undervaluation.

In these entries, "a true and original invoice" was demanded by

¹ 4 *Stats. at Large*, 593.

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the collector, under the acts of congress then in force, and simulated and fraudulent invoices were punished, and upon which the assessment of duties was made. A true and original invoice, [* 95] showing the first cost of the imports, formed the legal * basis for the estimate of the duties under these acts, and the production of this was the end which these enactments were designed to secure.

The tariff act of 1842, (5 Stats. at Large, 548,) was adopted after these decisions.

Its title signifies that its purpose, among other things, "was to change and modify existing laws imposing duties on imports," and all conflicting acts and parts of acts were expressly repealed. The frauds referred to in the cases cited, were accomplished by false representations of the cost of the import, in the invoice, and the danger of a forfeiture for an undervaluation did not prevent them.

The act of 1842 abolishes the "cost price at the place of exportation," as the basis of the estimate of duties, but employs the "market value," or "wholesale price," and provides appraisers, who were to ascertain these without regard "to any invoice whatever." To perform this office, they were armed with inquisitorial powers, might call for merchants' books, letters, invoices, and papers, and examine, as witnesses, the parties in interest. False swearing was punished with the forfeiture of the import, and as a perjury.

Here, then, is the substitute for the invoice in the old system, in the ascertainment of the basis of the estimate, and these were the sanctions employed to secure its integrity.

The "true and original invoice" would, nevertheless, afford important evidence to ascertain the "market value," for, in a majority of cases, this would be the "cost." The production of the true invoice was still required in every entry. If the invoiced value differed from the appraised or market value, ten per centum, an additional penal duty, now amounting to twenty per centum, was exacted. This was to compel a fair exhibition of a "true invoice." This duty is collected without suit, depends upon the single fact of a variation of ten per centum between the market and invoice price, and has proved a most efficient instrument to prevent fraud. Besides, the duty may be collected in goods at the invoice rate, and thus the undervaluation would be corrected.

Finally, "if any person shall, wilfully, and with intent to defraud, make out, or pass, or attempt to pass, through the custom-house, a false, forged, or fraudulent invoice, every such person, his aiders and abettors, shall be deemed guilty of a misdemeanor, and shall be fined in any sum not exceeding \$5,000, or imprisoned for a term of time

not exceeding two years, one or both, at the discretion of the court." (5 Stats. at Large, 565, § 19.)

The invoice spoken of in this section of the act, is one which does not represent truly the facts the importer is bound to disclose at the date of his entry, and which are exhibited by [* 96] an original and true invoice, and where the misrepresentation, whether by falsehood, forgery, or fraud, is with the design to evade the duties. It is admitted that this act provides for cases never before comprehended in any revenue law. For the attempt to defraud is punished as well as the consummate effort. The system of the act of 1842 is thus disclosed: It relies upon a home valuation made by public officers, upon evidence, instead of a representation of cost by the importer, as the basis of value in the assessment; and it provides, by forfeiture, and fine, and imprisonment, against the false testimony of the importer. It compels the production of the original and true invoice, by a penal duty, by fine and imprisonment, and the power to take payment of duties in undervalued goods.

There are, besides, provisions directed against smuggling. The act contains a selection from the various laws which had been passed by congress, whether in force, or otherwise, and introduces new securities for the collection of the revenue.

Every case provided for by the system first considered, is distinctly and efficiently provided for in the act of 1842.

The principle applicable to such a state of facts, is laid down by this court in *Norris v. Crocker*, 13 How. 429. "That where a new statute covers the whole subject-matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication, as the two provisions cannot stand together;" and that where "a recent statute covers every offence found in the former act," and prescribes a new and different penalty, recoverable by indictment, "it is plainly repugnant."

The statement of the systems adopted at the different periods, will show that the importance of the 66th section of the act of 1799 had ceased, and that the retention of it, as a cumulative penalty, would accomplish no good, and serve only to involve the government in litigation, that the revenue officers might claim the penalty.

17 H. 97, 98, 99; 22 H. 299.

United States v. One Package of Merchandise. 17 H.

THE UNITED STATES, Plaintiffs in Error, v. NINE CASES OF SILK
HATS. PAUL TRIGON, Claimant.

17 H. 97.

The decision in the next preceding case, again affirmed.

ERROR to the circuit court of the United States for the eastern district of Louisiana.

NELSON, J., delivered the opinion of the court.

This was a libel of information, filed in the district court of the United States v. Nine Cases of Silk Hats, for condemnation and forfeiture, on the allegation that the entry of the goods at the custom house was made upon an invoice, in which they were invoiced at a less sum than the actual cost at the place of exportation, with a design to evade the duties.

After hearing the evidence, the court instructed the jury that the 66th section of the act of 1799,¹ which imposed a forfeiture of the goods in question, had been repealed, and was not in force at the time of the entry at the customs; and gave judgment for the claimant. On a writ of error to the circuit court, this judgment was affirmed.

For the reasons given in the case of the United States v. Sixty-Seven Packages of Dry Goods, the judgment must be reversed, and the record remitted to the court below for further proceedings, in conformity to the opinion of this court.

Campbell, J., dissented.

THE UNITED STATES, Plaintiffs in Error, v. ONE PACKAGE OF MER-
CHANDISE. LION, PINSARD, AND Co., Claimants.

17 H. 98.

The decision in the two preceding cases affirmed.

ERROR to the circuit court of the United States for the eastern district of Louisiana.

NELSON, J., delivered the opinion of the court.

The libel of information was filed in this case in the district court of the United States for the eastern district of Louisiana; for the condemnation and forfeiture of one package of goods; the entry, as charged, having been made upon an invoice in which the goods

¹ 1 Stats. at Large, 677.

United States v. One Case of Clocks. 17 H.

were invoiced under their actual cost value at the place of exportation, with a design to defraud the duties. After the evidence was heard, the jury, under the instructions, found a verdict for the plaintiffs.

The court afterwards arrested the judgment for the plaintiffs, and directed a judgment for the claimants, on the ground that the 66th section of the act of 1799,¹ had been repealed; which judgment was affirmed, on error, by the circuit court.

For the reason given in the case of *The United States v. Sixty-seven Packages of Dry Goods*, the judgment below must be reversed, and the record remitted to the court for further proceedings, in conformity to the opinion of this court.

Campbell, J., dissented.

THE UNITED STATES, Plaintiffs in Error, v. ONE CASE OF CLOCKS.
LION, PINSARD, AND Co., Claimants.

17 H. 99.

The decision in the three preceding cases affirmed.

ERROR to the circuit court of the United States for the eastern district of Louisiana.

NELSON, J., delivered the opinion of the court.

This is a libel of information, filed in the district court of the United States for the eastern district of Louisiana, for the condemnation and forfeiture of one case of clocks, for entry of goods upon an invoice, in which the goods were invoiced at a sum less than the actual cost value at the place of exportation, with a design to evade the duties.

The jury found a verdict for the plaintiff, upon which a judgment was rendered; but afterwards, the court arrested and set aside the judgment, and gave judgment for the claimants, dismissing the libel, which was affirmed on error in the circuit court.

For the reasons given in the case of *The United States v. Sixty-seven Packages of Dry Goods*, the judgment of the court below must be reversed, and the record remitted for further proceedings, in conformity to the opinion of this court.

Campbell, J., dissented.

¹ 1 Stat. at Large, 677.

Lawrence v. Minturn. 17 H.

ALEXANDER M. LAWRENCE and others Claimants of the SHIP HORNET, Appellants, v. CHARLES MINTURN.

17 H. 100.

Primâ facie the consignee of goods under a bill of lading, has the legal title and a beneficial interest in the goods, and may sue the carrier for the non-delivery thereof.

Powers of the master, respecting jettisons, stated.

There is no implied warranty by the owners, that the vessel shall prove sufficiently buoyant to carry cargo placed on deck under a contract with the shipper. He takes the risk of perils, arising solely from that place of stowage in which he agreed his property should be carried.

THE case is stated in the opinion of the court.

Cutting, for the appellants.

Lord, contra.

[* 105] * CURTIS, J., delivered the opinion of the court.

This is an appeal from a decree of the district court of the United States for the northern district of California, sitting in admiralty. The appellee filed his libel in that court against the ship *Hornet*, for the non-delivery of two steam-boilers and chimneys shipped on board that vessel in the port of New York, and consigned to the libellant.

The appellants intervened, as owners of the ship, and upon the pleadings and proofs, the district court made a decree in favor of the libellant. The claimants appealed.

The first question to be determined on the appeal is, whether the libellant had a right to sue in his own name. The facts bearing on this question are, that on the 19th day of July, 1851, Edward Minturn, at New York, made a contract with the agent of the ship *Hornet*, which was reduced to writing, as follows:—

Memorandum of agreement to ship on board the ship *Hornet*, by Edward Minturn, Esq., two boilers, two chimneys or steam-chests, smoke-pipes in sheets, and some grate bars, in all about forty tons weight, from this port to San Francisco, California, for the sum of forty-five hundred dollars, with five per cent. prime: the whole to go on deck, except the grate-bars and sheet-iron for smoke-pipe. It is understood that the shipper is to put them on the deck of the vessel at his expense, and the ship is to discharge them as soon as convenient, and they are to be received at Cunningham's wharf, in San Francisco, without other than the ordinary charge per day for discharging. It is further understood that the said boilers are

[* 106] to be ready to go on board the * vessel on the ninth day of

Lawrence v. Minturn. 17 H.

August, or as soon thereafter as the ship may require them giving shipper two days' notice thereof

(Signed)

EDWARD MINTURN.

E. B. SUTTON,

Agent for the Ship Hornet.

It appeared that the boilers and chimneys were manufactured in New York, upon an order given by James Cunningham; that they were intended for the steamer Senator, a boat then in California; that James Cunningham and Edward Minturn were part owners of The Senator, and that they paid the makers for these articles. The bill of lading was as follows:—

210. Shipped, in good order and well-conditioned, by Edward Minturn, on board the ship called The Hornet, whereof Lawrence is master, now lying in the port of New York, and bound for San Francisco, California, to say: two boilers, and two steam-chimneys for ditto, eight pieces sheet-iron work, three pieces pipe, one band, two hundred and four grate-bars, sixteen grate-bar bearers, eight boiler bearers, six man-hole plates, eight boiler doors, one bundle (four) bolts, two boxes; the whole to be discharged as soon as convenient, and to be received at Cunningham's wharf, in San Francisco, without other than the usual or ordinary charge for discharging per day; being marked and numbered as in the margin.

Freight \$4,500 00

5 per cent. primage 225 00

\$4,725 00

E. B. SUTTON,

84 Wall street.

Dispatch line California pack-
ets.

Contents unknown.

Goods to be delivered at the vessel's tackles when ready to be delivered. Not accountable for breakage, leakage, or rust; freight payable before delivery, if required; and are to be delivered in like order and condition, at the port of San Fran-

cisco, (the dangers of the seas, fire, and collision only excepted,) unto Charles Minturn, or to his assigns, he or they paying freight for the said boilers, steam-chimneys, and other iron work, forty-five hundred dollars, with five per cent. primage, and average accustomed.

In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in New York, the 19th day of August, 1851.

(Signed)

WILLIAM W. LAWRENCE.

Upon the proofs, we are of opinion that the libellant had a right to sue the carrier in his own name. He is the consignee named in

the bill of lading; and, in the absence of evidence to control the effect of that document, the property is presumed to [*107] *be in him. In *Evans v. Marlett*, 1 Lord Raymond, 271, it is laid down that "if goods, by bill of lading, are consigned to A, A is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special, to be delivered to A, to the use of B, B ought to bring the action."

Whether it be strictly correct to affirm that in the case first put, A shall have a right of action against the carrier, though in point of fact he be only an agent for the consignor, has been much controverted. In *Griffith v. Ingledew*, 6 S. & R. 429, goods were shipped by A for his own account and risk, but deliverable under the bill of lading to B or his assigns. The previous decisions were examined with great care. There was difference of opinion on the bench, Mr. Justice Gibson dissenting; but the majority of the court held, that by force of the bill of lading, the legal title was in the consignee, and he could maintain the action.

Since that decision was made, the question has been much discussed, both in this country and in England. It is not easy to reconcile the decisions. We shall not attempt to do so here; the case does not require it. For, if we take the rule to be that an action against the carrier cannot be brought by a consignee who has no beneficial interest in the goods, it still remains true, that a presumption of such an interest in the consignee arises from a bill of lading which makes the goods deliverable to him or his assigns. This is admitted in the cases in which it has been held that the consignee had not the right of action or was not liable for the freight. *Coleman v. Lambert*, 5 M. & W. 502; *Wright v. Snell*, 5 B. & Ald. 350; *Chandler v. Sprague*, 5 Met. 306.

In *Grove v. Brien et al.* 8 How. 439, this court said: "The effect of a consignment of goods generally is to vest the property in the consignee;" and though it is also there declared that this effect may be controlled by special clauses in the bill of lading, or by evidence *aliunde*, yet the general effect of a bill of lading to raise a presumption of property in goods in him to whom it makes them deliverable, is conceded.

This is in accordance with the rule given in *Abbott on Shipping*, pages 415, 416.

Such being the presumption arising from the bill of lading, we do not find it to be controlled by any proof in this case. It does appear that Edward Minturn and James Cunningham were part owners of *The Senator*, for which boat these boilers and chimneys were intended, and that they contracted with the makers of the articles and paid

for them, and that Edward Minturn shipped them in New York. But all this leaves open the question, whether the libellant was not the managing owner *and ship's husband of The Sen- [* 108] ator, residing in California, where that boat was employed, attending to its repairs and supplies, for the joint account of himself and the other owners. Indeed, the testimony of Squire, an agent of the libellant, in the absence of all other evidence, tends to prove that such was the fact ; for he speaks of himself as acting for the libellant in reference to the management of The Senator, and says that, her boilers being worn out, an order was sent out to obtain new ones, to replace the old. We understand this order to have been given by the libellant, for the boilers now in question.

Considering the burden of proof to have been on the respondents to displace the *prima facie* right of action of the consignee, arising from the bill of lading ; that for aught he has shown, and upon the proof, we may conclude that the consignee ordered these articles as managing owner of The Senator ; and that, if so, he, as consignee and managing owner, might sustain the libel in his own name ; this objection to the decree must be overruled.

The next inquiry is, whether the failure to deliver the boilers and chimneys is justified ?

The Hornet sailed from New York, on the 23d of August, 1851, having these articles on deck. On the 5th of September, the chimneys, and on the 12th of September the boilers were thrown overboard.

Two questions arise :—

1. Was the jettison necessarily made for the common safety ? and if so,

2. Was the necessity attributable to any, and what, fault on the part of the master of the vessel ?

The material facts upon which the first of these questions depends, are, that The Hornet was a clipper-ship of about sixteen hundred tons burden, built at New York, in the years 1850 and 1851, of the best materials in use for first-class ships at that port. She had a cargo under deck, and the weight of these boilers and chimneys on deck was somewhat over thirty-one tons. The height of each of the boilers, above the deck at the forward end, when stowed, was about twelve feet. The steam-chimneys were between five and six feet in diameter, and besides these there was a piece of steam-pipe weighing six hundred and sixty-seven pounds. The ship sailed on the 23d of August, and on entering the Gulf Stream encountered rather heavy weather and a cross sea. The performance of the vessel in this sea was found to be bad. On the 26th, a gale came on from the south, veering to the northwest, and lasted until the night of the 27th.

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Though this gale was not of uncommon severity, it raised a heavy cross sea. The effect of this sea was to cause the ship [* 109] * to roll down to leeward, so as to take in water over her rail; she rose very slowly and then rolled over to windward, straining and laboring in a manner described by the witnesses as very unusual. She would not mind her helm, but would fall off; she would settle down aft and take in water over her stern, and plunged heavily forward. At sundown on the 27th, the wind lulled and the sea became more smooth. It was found during and immediately after the gale, that the ship was very severely strained, so as to open some wood-ends aft, one half to three quarters of an inch, and her waterway seam half an inch, and that other injuries, of an alarming character, had been received. The master then held a consultation with his officers, and drew up the following protest:—

August 29, 1851, latitude $31^{\circ} 0'$ N., longitude $61^{\circ} 5'$ W.

At sea, on board ship *Hornet*, of New York, William W. Lawrence, master, bound from New York to San Francisco, California.

We, the undersigned, master, officers, and mariners of the ship *Hornet*, of New York, do, after mature and serious deliberation, enter this solemn protest: That on the 26th day of August, 1851, the ship *Hornet* being then in or about the longitude of 49° W., latitude 37° N., experienced a gale of wind from the south, veering to N. W.; and that during said gale, which lasted until the night of the 27th of August, the weight of the deck load, consisting of two boilers, with furnaces attached, and two steam-chimneys, (the whole supposed to be of the weight of forty tons, or thereabouts,) did cause the ship to labor very hard, rolling gunwale deep, shipping large bodies of water, straining the ship in her upper works and decks, causing the ship to leak badly, and her pumps constantly worked, placing our lives, ship, and cargo, in imminent peril for their safety. We now, therefore, do most seriously and solemnly assert, that for the future preservation of the ship, and thereby our lives and cargo, the said boilers, furnaces, and chimneys are unsafe on the decks, and for the safety of the whole should be thrown overboard as soon as possible, the weather and sea permitting.

In testimony whereof to the above, we hereby subscribe our respective names.

This protest was signed by all the officers and by such of the crew as could write, and its substantial facts are testified to by the master and officers who were examined in the cause, in such a manner as to satisfy us of their truth.

Upon these facts, we have come to the conclusion that the jettison was necessary for the common safety.

The nature of the case imposes on the master the duty, and clothes him with the power, to judge and determine upon the *facts before him, whether a jettison be necessary. He de- [* 110] rives this authority from the implied consent of all concerned in the common adventure. The obligation of the owners is to appoint a competent master, having reasonable skill and judgment, and courage; and they are liable, if through his failure to possess or exert these qualities, in any emergency, the interest of the shippers is prejudiced. But they do not contract for his infallibility, nor that he shall do, in an emergency, precisely what, after the event, others may think would have been best.

If he was a competent master; if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person, to whom the law has intrusted authority, to decide upon and make it, has duly exercised that authority.

Applying these principles to the case before us, we find no reason to doubt that this jettison was thus necessary. It is true, that when it was actually made, the sea was smooth, and the ship in no immediate danger. But it satisfactorily appears, that these boilers and chimneys could not be thrown overboard, without the greatest risk, when there was any considerable sea. To require delay until a storm, would be, in effect, to prohibit the sacrifice. Precaution against dangers, which are certain to occur, is surely proper. That they must experience gales and heavy seas at that season, in that voyage, was so nearly certain, that it was not unreasonable to act on the assumption that they would occur, and prepare the ship to encounter them while in a smooth sea, when alone they could do so.

We find the conduct of the master and crew in making the jettison to have been lawful; and the remaining inquiry is, whether the necessity for it is to be attributed to any fault on the part of the master or owners.

The libel alleges the loss of the goods to have been "through the mere carelessness, unskilfulness, and misconduct of the said master, his mariners, and servants."

We were at first inclined to the opinion that this allegation is not broad enough to put in issue what the libellants have at the hearing much relied on, and what we think is the main question in this part of the case; the sufficiency of the ship to carry this cargo. It is, no doubt, the general rule, that the owner warrants his ship to be sea-

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worthy for the voyage with the cargo contracted for. But a breach of this implied contract of the owners does not amount to negligence, or want of skill of the master or mariners.

[* 111] * There would be much difficulty, therefore, in maintaining, as a general proposition, that an allegation of negligence of the master would let the libellant in to prove unseaworthiness of the vessel.

But it must be observed that this libellant relies not on general unseaworthiness, but upon the fact that a vessel, staunch and sufficient to carry a cargo, was overloaded by this burden on the deck; and as the quantity of lading and the consequent trim and seaworthiness of a vessel are matters as to which the master is, generally speaking, bound to exercise his skill, and over which he is intrusted for the benefit of all concerned with a supervision, his failure to do so properly, is negligence, for which the owner may be liable. While, therefore, we have some difficulty in respect to the sufficiency of this allegation, we think it is such as necessarily leads us into the inquiry, whether the loss by jettison was occasioned by negligence of the master in overloading the ship. And as we find it extremely difficult, if not impossible, to distinguish between the obligation of the owners and master, in these particulars, we shall proceed to consider the question whether the case is one of culpable negligence, or is within the exception of perils of the seas, contained in the bill of lading.

There can be no doubt that a loss by a jettison, occasioned by a peril of the sea, is a loss by a peril of the sea. In that case the sea-peril is deemed the proximate cause of the loss. But if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to sea-peril, though that also may be present and enter into the case. This distinction is familiar in the law of insurance. *General Mut. Ins. Co. v. Sherwood*, 14 How. 365, and cases there cited.

In this case, did the necessity for the jettison arise from any fault or breach of contract by the master or owners?

Two grounds are assumed by the libellant. The first is, that considering the great weight of these articles, resting upon a small part of the upper deck, sufficient means were not used to support the weight and stiffen the ship, so as to prevent the deck from being strained.

This was a new ship, built of such materials, and so fastened and braced, as to be uncommonly strong. The owners employed a ship-carpenter, who had worked on the vessel when built, to do what he

deemed necessary to support this unusual weight on the deck. He describes what was done. The master superintended these alterations. He and the carpenter deemed them sufficient. They were both going to sea in the vessel, the one *as com- [*112] mander, the other as carpenter, and can hardly be supposed to have omitted any thing which they thought necessary for safety. The owners do not appear to have restricted them, in point of expenditure. We cannot avoid the conclusion that every thing was done which these men thought necessary ; and possessing, as they must be presumed to have done, competent skill in their respective occupations, they believed this part of the cargo was securely stowed, and fastened and stayed, to go safely on the voyage. In point of fact, however, after being subjected to the action of the sea in a storm, it was found the deck had settled.

The second ground taken by the libellants is, that the ship was so overloaded, by the great weight of these articles on deck, as to be unseaworthy ; and as the jettison was made to relieve the vessel from this condition, the owners are responsible for the loss. In part, at least, the same principles of law will be found applicable to both these grounds, and therefore we consider them together.

The principal question, and it is one of much importance, is, what is the extent and operation of the implied contract of the owner, respecting the ability of his ship to carry a particular deck load which he receives on board, under a contract that it shall be carried on deck, dangers of the seas excepted ?

In general, the owner warrants the sufficiency of his vessel to carry the cargo put on board by the freighter, provided the vessel be not injured by a peril of the sea. Besides this, he contracts for the use of due care and skill in stowing the cargo and in navigating the vessel.

But in applying these rules to cargo on deck, some peculiar considerations must be borne in mind.

This bill of lading declares that the property is to go on deck. It excepts perils of the seas. The exception must be construed with reference to the particular adventure, which the contract of affreightment shows was contemplated by the parties. Under this bill of lading, the question is, not what in other circumstances could be deemed a peril of the sea, but what is to be deemed such when operating on this vessel, with this deck load. If a very burdensome cargo, like iron, is taken on board, and heavy weather met with, and a jettison made, it would not be a ground of claim against the owner, that the weather encountered would not have been sufficient to justify a jettison if the cargo had been cotton.

And when this freighter consented to place on the deck of this ship his boilers and chimneys, weighing upwards of thirty tons, not distributed about the deck, but lying in a small space, must he not be taken to have known that their necessary effect might be [*113] * to embarrass the sailing of the ship in a gale of wind, and cause her to labor in a heavy sea. The grounds upon which the rights and obligations, as to contribution, of owners of cargo on deck, in case of jettison, have long rested, have an intimate connection with this question. Valin, lib. 3, tit. 8, art. 12, giving the reason of the rule, that goods, jettisoned from the deck, are not paid for in general average, but contribute if not thrown over, says: "The reason why articles on deck, thrown overboard or damaged, are not contributed for, is, that as they cannot but embarrass the working of the ship, the presumption is, that they have been jettisoned before a full necessity for a jettison of cargo arose, and only because they hindered and confused the manœuvring of the vessel."

This has been still more clearly expressed by Locré, in his Commentary on the Code du Commerce Maritime, lib. 2, tit. 12, art. 421. He says: "Perhaps the common safety would not have made a jettison necessary if the lading had not been in contravention of rule, if it had not brought the dangers on the vessel, or contributed to enhance them." Similar views have been taken by the most approved writers on the law of insurance, in this country and in England, and they have been applied in many cases. Abbott on Shipping, 481, 490, and notes; 3 Kent's Comm. 240; 2 Phillips on Ins. 71; 2 Arnold on Ins. 890. It was remarked by Lord Denman, in *Milward v. Hibbert*, 3 Ad. & El. N. S. 120, that the reason assigned by Valin, that goods on deck embarrassed the navigation of the ship, is not sufficient to form the basis of a universal rule, excluding goods on deck from the benefit of contribution; because it may be that, in many cases, goods can best and most safely be stowed on deck; and that they may, in some cases, be so stowed as not to be in the way of the crew in their operations. This may be true; but the point here is, not whether there may be cases in which the deck load does not embarrass the navigation or increase the danger, but whether, in case it does so, the shipper who has consented to his goods being placed on deck, under a special contract, and not pursuant to any general custom, which might be evidence of the safety of the practice, must not be taken to have known that such might be its effects.

It was strongly urged, by the libellant's counsel, that the shipper could not be supposed to have, and should not suffer for not possessing, a knowledge of the capacity or sufficiency of the ship; that the carrier was bound to know that the instrument, by which he agreed

to perform a particular service, was sufficient for that service ; and that, as these carriers contracted to convey this deck load to San Francisco, they were obliged to *ascertain whether [*114] placing it on deck would overload their vessel. This appears to have been the ground on which the court below rested its decree.

This reasoning would be quite unanswerable, if applied to a shipment of cargo under deck, or to its being laden on deck without the consent of the merchant, or to a contract in which perils of the sea were not excepted. But the maritime codes and writers have recognized the distinction between cargo placed on deck, with the consent of the shipper, and cargo under deck.

There is not one of them which gives a recourse against the master, the vessel, or the owners, if the property lost had been placed on deck with the consent of its owner ; and they afford very high evidence of the general and appropriate usages, in this particular, of merchants and ship-owners. Consolato, par Pardessus, 'c. 186, Ord. de Mer, Valin, lib. 2, tit. 1, art. 12 ; Code du Com. Mar. par Locré, art. 229, lib. 2, tit. 4, art. 229 ; Emerigon, c. 12, § 42 ; Boulay Paty, tom. 4, 566, 568.

So the courts of this country and England, and the writers on this subject, have treated the owner of goods on deck, with his consent, as not having a claim on the master or owners of the ship, in case of jettison. The received law, on the point, is expressed by Chancellor Kent, with his usual precision, in 3 Com. 240 : " Nor is the carrier in that case (jettison of deck load) responsible to the owner, unless the goods were stowed on deck without the consent of the owner, or a general custom binding him, and then he would be chargeable with the loss."

The cases of *Smith et al. v. Wright*, 1 Caines, 43 ; *Dodge v. Bartol*, 5 Green. 286 ; *Hampton v. The Brig Thaddeus*, 4 Martin's Lou. 582 ; *Story on Bailments*, 339, § 531 ; and *Gould v. Oliver*, 4 Bing. N. C. 142, support this statement. In the last-mentioned case, Tindal, C. J., says : " Now, where the loading on deck has taken place with the consent of the merchant, it is obvious that no remedy against the ship-owner or master, for a wrongful loading of the goods on deck, can exist. The foreign authorities are, indeed, express on that point ; and the general rule of the English law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his loss, leads to the same conclusion."

It must be admitted, that no one of the authorities referred to, goes so far as to maintain that the ship-owner contracts no obliga-

tion whatever to the merchant, respecting the sufficiency of the vessel to carry the deck load received on board. They should not be understood as supporting such a position. The extent to which [* 115] we understand them to go, and the law which * we intend to lay down, is this; that if the vessel is seaworthy to carry a cargo under deck, and there was no general custom to carry such goods on deck in such a voyage, and the loss is to be attributed solely to the fact that the goods were on deck, and their owner had consented to their being there, he has no recourse against the master, owners, or vessel, for a jettison rendered necessary for the common safety, by a storm, though that storm, in all probability, would have produced no injurious effect on the vessel if not thus laden. It is not for him to say that, in the first storm the vessel encountered, though not of unusual severity, she proved to be unable to carry the deck load, and so was not of sufficient capacity to perform the contract into which the carrier entered.

The carrier does not contract that a deck load shall not embarrass the navigation of the vessel in a storm, or that it shall not cause her so to roll and labor in a heavy sea, as to strain and endanger the vessel. In short, he does not warrant the sufficiency of his vessel, if otherwise stanch and seaworthy, to withstand any extraordinary action of the sea when thus laden. If the vessel is in itself stanch and seaworthy, and her inability to resist a storm arises solely from the position of a part of the cargo on the deck, the owner of the cargo, who has consented to this mode of shipment, cannot recover from the ship or its owners, on the ground of negligence, or breach of an implied contract respecting seaworthiness. His right to contribution is not involved in this case.

Applying these principles to the case before us, there is no difficulty in coming to a satisfactory conclusion. This vessel was uncommonly stanch and strong. The amount of dead weight on board was not excessive, for there is no pretence that she was too deep in the water. There was no apparent inability to carry the deck load when she sailed, nor until heavy seas were encountered. Her inability to carry these boilers and chimneys arose solely from their particular position on deck.

The libellant, through the shipper in New York, consented to their being placed in this position. He took the risk of their rendering the ship unmanageable in a storm; and he, and not the ship-owners, must bear the loss occasioned by their being placed on the deck, so far as the liability for the loss rests upon any ground of negligence in the place of stowage, or breach of warranty respecting the seaworthiness of the vessel. As to the argument, that there was negligence in not

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properly stowing and supporting this burden on deck, we think it is not made out in proof. The master is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall prove sufficient. We are of *opinion that due diligence and skill were used. Be- [*116] sides, we do not find the necessity for the jettison attributable to any defects in these particulars. It may be, that additional supports of the lower deck would have assisted the vessel in bearing the weight, but we see no reason to believe they would have enabled it to carry this unusual burden through a storm; and, therefore, if we found negligence in this particular, we could not declare that the loss was to be attributed to it.

The decree of the district court is to be reversed, and the cause remanded, with directions to dismiss the libel with costs.

19 H. 162; 21 H. 881; 8 Wal. 451, 514.

ADAM D. STEWART, Plaintiff in Error, v. THE UNITED STATES.

17 H. 116.

There is no act of congress which enables a collector of customs to act as an inspector and claim compensation therefor.

THE case is stated in the opinion of the court.

W. S. Coxe, for the plaintiff.

Cushing, (attorney-general,) *contra*.

* DANIEL, J., delivered the opinion of the court. [* 124]

This case comes before us upon a writ of error to judgment of the circuit court of the United States for Washington county, in the District of Columbia, in favor of the defendants in error, against the plaintiff, as collector of the revenue for the district of Michilimackinac. The jury, upon the trial in the circuit * court, [* 125] rendered a verdict for the defendants in error, for the sum of \$638.81, with interest thereon from the 13th day of January, 1833; and for this amount the court, at its October term, 1852, gave judgment.

The questions of law passed upon and reserved by a bill of exceptions in the court below, and which this court are now called on to review, arise upon the following agreed statement of facts, namely:—

That on or about the 12th of March, 1818, the defendant was appointed by the President of the United States, collector for the

district of Michilimackinac, and inspector of the revenue for the port thereof; which offices he continued to hold, by successive reappointments, and to receive the emoluments of, till the 15th day of January, 1833.

“ That on or about the 1st of April, 1819, the defendant was appointed, by the secretary of the treasury, inspector of the customs for the port of Michilimackinac; which office he continued to hold, under his original appointment, until January 15, 1833. The defendant's is the only case found on record of a collector holding at the same time the office of inspector of the customs. His allowance, in this capacity, was fixed by the secretary at forty dollars a month, and so continued until the second quarter of the year 1820, when it was increased by the secretary to three dollars per day, the maximum allowance permitted by law to a regular inspector of the customs. The defendant continued to be paid, as inspector of the customs, at this rate, till the 1st of July, 1822, when the act of congress of the 7th May, 1822, went into effect, entitled: ‘An act further to establish the compensation of officers of the customs, and to alter certain collection districts, and for other purposes.’ 3 *Stata. at Large*, 693. The 18th section of this act is as follows: ‘No collector, surveyor, or naval officer shall ever receive more than \$400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law, for any services he may perform for the United States, in any other office or capacity.’ ”

“ A copy of the foregoing law was duly transmitted by the treasury department to the defendant. In his accounts for the 3d and 4th quarters of the year 1822, the defendant charged compensation at the rate of \$3 a day, as inspector of customs, which charge was disallowed at the treasury; and in his accounts for the first three quarters of the year 1823, he charged compensation at the rate of \$40 a month, as inspector of the customs, which latter charge was also disallowed at the treasury. The defendant rendered several other accounts, containing no charge as inspector of the customs,

till the end of the year 1824. In a treasury settlement, [* 126] made at that date, the defendant is *credited with \$1,000,

‘the amount of an allowance made by the secretary of the treasury, to the collector, for services as inspector, from 1st July, 1822, to 31st of December, 1824, at \$400 per annum.’ In his account rendered for the first quarter of the year 1825, the defendant charged himself with the balance found due from him on the next preceding settlement, in which he had been allowed but \$400 per annum, as inspector of the customs; and in his several successive

settlements, from that time to 31st December, 1831, continued to charge only \$400 per annum, as inspector of the customs."

"By the act of 2d March, 1831, 'to regulate the foreign and coasting trade on the northern, northwestern, and northeastern frontiers of the United States, and for other purposes,' 4 Stats. at Large, 487, the compensation of every collector, on the northern and northeastern and northwestern lakes and rivers, 'was fixed at an amount equal to the entire compensation received by such officer during the past year.' The defendant was credited, in 1831, and subsequently with the compensation allowed to him in 1830, being \$835.85, which included \$400, allowed him as inspector of the customs. In 1832, he charged his compensation under this law; but in the 4th quarter of that year he claimed the difference between \$400 and \$1,095 a year, from the 30th of June, 1822, to the 31st of December, 1832, being \$7,297.50, for ten years and six months. This claim was, before the commencement of this suit, presented to the accounting officers of the treasury for their examination, and was disallowed. On the foregoing evidence, the counsel for the defendant prayed the court to instruct the jury as follows: That the 18th section of the act of congress, passed on the 7th of May, 1822, further to establish the compensation of the officers of the customs, &c., was not intended to operate, and ought not to be construed as operating, so as to limit the salary or compensation of any district officer, which may by distinct and independent appointment be vested in the person of one holding at the same time the separate office of collector, surveyor, or naval officer; and that such limitation applies only to cases where the collector, surveyor, or naval officer is called to perform services in any other office or capacity, in virtue of, and as an incident to, his office; not to any case where either of those officers was appointed to and executed the duties of another separate office, whilst collector, surveyor, or naval officer."

"If, therefore, the defendant was appointed to, and held and exercised, the office of inspector of customs, at the same time as that of collector of Michilimackinac, such office of inspector was not within the purview of the 18th section of the said act.

"Which instruction the court refused to give."

* In the above statement of the claim of the plaintiff in [* 127] error there is an apparent confusion in terms, which it may be proper here to mention, although its elucidation is not deemed essential to the decision of this case. Thus, it is said that the plaintiff in error was, in March, 1818, commissioned by the President, collector for the district of Michilimackinac, and inspector of the revenue for the port thereof, which offices he held by successive com-

missions until the 15th of January, 1833. In the next place, it is stated that the plaintiff in error was, on the 1st of April, 1819, appointed by the secretary of the treasury inspector of the customs for that port, which latter office he also continued to hold under this appointment until the 15th of January, 1833.

If by these two statements, a distinction is designed between the office of inspector of the revenue and that of inspector of the customs, this court can perceive no warrant for any such distinction, but must regard the terms used as properly applicable to those inspectors or agents who, by the 21st section of the revenue law of March 2, 1799,¹ are authorized, together with weighers, gaugers, and measurers, to be employed by the collectors, with the approbation of the officer at the head of the treasury department.

Again, regarding as we do the place of inspector, alleged to have been conferred by each of the appointments spoken of by the plaintiff, to be the same in character and objects as provided in the statutes, there would be a manifest irregularity in an attempt to refer its origin and commencement to different sources of creation, and thus to cover the same duties and obligations, and for the same period of time, under the guise of distinct and separate commissions.

The foundation of the claim preferred by the plaintiff in error, rests on the position that the offices of collector and surveyor are separate and different in their character, and in the powers and duties allotted to each; and that under his separate commission, and in the discharge of his separate and appropriate duties, each officer is entitled to his separate and appropriate compensation.

Let us examine this proposition; nay, let it, as a general proposition, be conceded; the inquiry will still remain, how far the concession will sustain the claim of the plaintiff in the present instance.

It is undeniably true, that the act of congress of March 2, 1799, Stats. at Large, 642, creates and enumerates separately the different offices of collector, naval officer, surveyor of the port, inspector, weigher, gauger, and measurer, and defines and prescribes the functions and duties of each respectively. And it is clear that [* 128] in ports or districts in which all these offices * are called into actual existence, the functions and duties assigned to any one of them are not appropriated in terms, nor by necessary implication, to any of the others; on the contrary, those duties and functions, as distributed by the law, appear to be different, and in some sense incompatible with their union in the same individual, being in some instances in their nature supervisory, and being designed to insure the fulfilment of a portion of those duties by others.

¹ 1 Stats. at Large, 642.

But whilst this is the case, there cannot be denied to congress the power, under circumstances satisfactory to themselves, to blend in the same person or office functions or duties which, under another aspect of facts, they have thought it proper to divide and distribute. This is clearly a question of legislative discretion, bearing upon views of public necessity or policy; and accordingly we find, that, in view of such policy or necessity, congress have, by the very same act of March 2, 1799, materially modified, and to a certain extent contravened, the previous organization prescribed for the collection of the revenue, adapting such modification to the facts or necessities, as they should really exist.

Notwithstanding, however, the power must be conceded to congress to combine in the same officer duties and powers in their nature seemingly incompatible, that power can be conceded to the legislative authority alone and expressly declared, and cannot be implied upon any sound principle of legal interpretation or of public policy. Congress have, it is true, ordained, in certain conjunctures, the union of the duties of collector, naval officer, and surveyor of the port, but under no circumstances have they transferred to either of the officers just enumerated the duties of inspector of the customs. This last-named agent, it is said by the statute, may, with the approbation of the officer at the head of the treasury department, be employed, by the collector. Under this provision of the statute, the question arises whether the collector *qua collector* can, under any circumstances, apart from express legislative direction, become inspector of the customs, or under the authority to employ such an agent can contract with himself to employ himself as such an agent? We are very sure that such a proceeding on the part of the collector is not authorized by the language of the statute, and we think it not warranted by any sound principle of policy, which on the contrary would inculcate a course tending rather to prevent than to invite to fraud and collusion. The collector, therefore, is not the inspector *virtute officii*, nor warranted in employing himself as inspector, nor in assuming the functions, nor in claiming the compensation, allowable to the latter officer.

In the case under consideration, the plaintiff in error has, by * the accounting officers of the government, been allowed [* 129] for compensation, as inspector, the sum of \$40 per month, until some time in the year 1820; and from the period last mentioned he was, for similar services, allowed the compensation of \$3 per diem, until the 1st of July, 1822, from which last period the compensation of the collector was limited by the government, for all extra services, to the sum of \$400 per annum, under the 18th section

of the act of May 7, 1822, which declares, "that no collector, surveyor, or naval officer, shall ever receive more than \$400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law for any services he may perform for the United States in any other office or capacity."

The several allowances made by the government to the plaintiff in error, as inspector of the customs, and received by him in that character, and acquiesced in by both parties, may be regarded as no longer presenting subjects of controversy; but the facts of such allowances, and the acceptance of them, cannot be permitted to control the construction of a public law, nor to influence a claim now asserted under the provisions of that law; much less can they be regarded as affecting the power of congress to regulate, prospectively, the duties and emoluments of agents created by its authority. When, therefore, the plaintiff in error advances a claim in the character of inspector, he must establish a legal and competent appointment to the office of inspector, and an appropriation to him of the duties and emoluments incident thereto. For these he has appealed to the revenue law of March 2, 1799; but neither in that, nor in any other revenue law, do we perceive, as appertaining to him as collector, the authority and functions of inspector, nor any right to compensation for the services of the latter officer.

With regard to the allowance of \$400 per annum, although accorded to him in settlement as inspector of the customs, it is plain from the language of the statute of May 7, 1822, § 18, that this was intended to provide compensation to the collector, naval officer, and surveyor of the port, for extraordinary services incident to their respective offices, and to them only; and did not embrace the subordinate position of inspector, as to which a different mode and rate of compensation, that is, one graduated by the month or by the day, had been provided. To entitle himself to this latter compensation, the claimant must show himself regularly and exactly in the situation to which the law has allotted it. Upon a consideration of the case, we regard the question properly before us to be this: whether the collector, as such, and in virtue of his office, can claim compensation for services not required by the language of the [* 130] statute by which * his duties are prescribed, nor inherently nor regularly appropriate to his office; services which the law has, upon obvious principles of policy, imposed on another and a different agent, subordinate to the collector, the performance of which services it is made the duty of the collector to supervise and enforce. We are of the opinion that the collector could have no such claim, and, therefore, decide that the judgment of the circuit court be affirmed.

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WILLIAM B. SHIELDS and others, Appellants, v. ROBERT R. BARROW.

17 H. 130.

Rules respecting the joinder and dispensing with parties to suits in equity in the courts of the United States.

A contract cannot be rescinded by a decree, without having before the court all the parties whose rights will be affected thereby; and an entire contract of compromise, cannot be rescinded in part, and left to stand as to the residue.

The act of February 28, 1839, (5 Stats. at Large, 321,) relates solely to the non-joinder of persons out of the reach of process.

The 47th rule for equity practice is only a declaration of the effect of previous decisions of this court, and does not enable a circuit court to make a decree which must affect the rights of absent persons.

Though a bill may be framed with a double aspect, the alternative case must be the foundation for the same relief.

Under the privilege of amending, the court should not allow a new and wholly different case to be made.

A circuit court cannot force defendants in an equity suit to file a cross-bill, and bring in new parties, whom those defendants are, but the complainants are not, competent to sue in the courts of the United States.

New parties cannot be introduced into a cause by a cross-bill.

THE case is stated in the opinion of the court.

Benjamin, for the appellants.

Janin, contra.

* CURTIS, J., delivered the opinion of the court. [* 137]

To make intelligible the questions decided in this case, an outline of some part of its complicated proceedings must be given. They were begun by a bill in equity, filed in the circuit court of the United States for the eastern district of Louisiana, on the 19th of December, 1842, by Robert R. Barrow, a citizen of the State of Louisiana, against Mrs. Victoire Shields, and by amendment against William Bisland, citizens of the State of Mississippi. The bill stated, that in July, 1836, the complainant sold certain plantations and slaves in Louisiana, to one Thomas R. Shields, who was a citizen of Louisiana, for the sum * of \$227,000, pay- [* 138] able by instalments, the last of which would fall due in March, 1844.

That negotiable paper was given for the consideration money, and from time to time \$107,000 was paid. That the residue of the notes being unpaid, and some of them protested for non-payment, a judgment was obtained against Thomas R. Shields, the purchaser, for a part of the purchase-money, and proceedings instituted by attachment against Thomas R. Shields and William Bisland, one of his

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indorsers, for other parts of the purchase-money then due and unpaid. In this condition of things, an agreement of compromise and settlement was made, on the 9th day of November, 1842, between the complainant, of the first part, Thomas R. Shields, the purchaser, of the second part, and the six indorsers on the notes given by Thomas R. Shields, of the third part. Of these six indorsers, Mrs. Shields and Bisland, the defendants, were two. By this new contract, the complainant was to receive back the property sold, retain the \$107,000 already paid, and the six indorsers executed their notes, payable to the complainant, amounting to thirty-two thousand dollars, in the manner and proportions following, as stated in the bill: —

“The said William Bisland pays ten thousand dollars, in two equal instalments, the first in March next, and the other in March following, for which sum the said William Bisland made his two promissory notes, indorsed by John P. Watson, and payable at the office of the Louisiana Bank in New Orleans. The said R. G. Ellis \$6,966.66, on two notes indorsed by William Bisland. The said George S. Guion, \$2,750, on two notes indorsed by Van P. Winder. The said Van P. Winder, \$2,750, on two notes indorsed by George S. Guion. The said William B. Shields, \$4,766.66, on two notes indorsed by Mrs. Victoire Shields; and finally, Mrs. Victoire Shields the same amount on two notes payable as aforesaid at the office of the Louisiana Bank, in New Orleans.”

The complainant was to release the purchaser, Thomas R. Shields, and his indorsers, from all their liabilities then outstanding, and was to dismiss the attachment suit then pending against Thomas R. Shields and Bisland.

The bill further alleges, that though the notes were given, and the complainant went into possession under the agreement of compromise, the agreement ought to be rescinded, and the complainant restored to his original rights under the contract of sale; and it alleges various reasons therefor, which it is not necessary in this connection to state. It concludes with a prayer that the act of compromise may be declared to have been improperly procured, [* 139] and may be annulled and set aside, * and that the defendants may be decreed to pay such of the notes, bearing their indorsement, as may fall due during the progress of the suit, and for general relief.

Such being the scope of this bill and its parties, it is perfectly clear that the circuit court of the United States for Louisiana, could not make any decree thereon. The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the

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others. Thomas R. Shields, the principal, and four out of six of his indorsers, being citizens of Louisiana, could not be made defendants in this suit; yet each of them was an indispensable party to a bill for the rescission of the contract. Neither the act of congress of February 28, 1839, 5 Stats. at Large, 321, § 1, nor the 47th rule for the equity practice of the circuit courts of the United States, enables a circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree.

In *Russell v. Clarke's Executors*, 7 Cranch, 98, this court said: "The incapacity imposed on the circuit court to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interests of absent persons, it may be the duty of the court to decree, as between the parties before them. But, in this case, the assignees of Robert Murray and Co. are so essential to the merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause till they are parties."

The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

* A bill to rescind a contract affords an example of this [* 140] kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a

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case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties.

Now it will be perceived, that in *Russell v. Clarke's Executors*, this court, after considering the embarrassments which attend the exercise of the equity jurisdiction of the circuit courts of the United States, advanced as far as this: They declared that formal parties may be dispensed with when they cannot be reached; that persons having rights which must be affected by a decree, cannot be dispensed with; and they express a doubt concerning the other class of parties. This doubt is solved in favor of the jurisdiction in subsequent cases, but without infringing upon what was held in *Russell v. Clarke's Executors*, concerning the incapacity of the court to give relief, when that relief necessarily involves the rights of absent persons. As to formal or unnecessary parties, see *Wormley v. Wormley*, 8 Wheat. 451; *Carneal v. Banks*, 10 *ibid.* 188; *Vattier v. Hinde*, 7 Pet. 266. As to parties having a substantial interest, but not so connected with the controversy that their joinder is indispensable, see *Cameron v. M'Roberts*, 3 Wheat. 591; *Osborn v. The Bank of The United States*, 9 *ibid.* 738; *Harding v. Handy*, 11 *ibid.* 132. As to parties having an interest which is inseparable from the interests of those before the court, and who are, therefore, indispensable parties, see *Cameron v. M'Roberts*, 3 *ibid.* 591; *Mallow v. Hinde*, 12 *ibid.* 197.

In *Cameron v. M'Roberts*, where the citizenship of the other defendants than Cameron did not appear on the record, this court certified: "If a joint interest vested in Cameron and the other defendants, the court had no jurisdiction over the cause. If a distinct interest vested in Cameron, so that substantial justice (so far as he was interested) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone." And the grounds of this distinction are explained in *Mallow v. Hinde*, 12 Wheat, 196, 198.

Such was the state of the laws on this subject when the act of congress of February 28, 1839, 5 Stats. at Large, 321, was passed, and the 47th rule, for the equity practice of the circuit court of the United States, was made by this court.

The first section of that statute enacts: That when, in [*141] any *suit, at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between

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the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement or other objection to said suit."

This act relates solely to the non-joinder of persons who are not within the reach of the process of the court. It does not affect any case where persons, having an interest, are not joined because their citizenship is such that their joinder would defeat the jurisdiction; and, so far as it touches suits in equity, we understand it to be no more than a legislative affirmance of the rule previously established by the cases of *Cameron v. M'Roberts*, 3 Wheat. 591; *Osborn v. The Bank of the United States*, 9 *ibid.* 738; and *Harding v. Handy*, 11 *ibid.* 132. For this court had already there decided, that the non-joinder of a party who could not be served with process, would not defeat the jurisdiction. The act says, it shall be lawful for the court to entertain jurisdiction; but, as is observed by this court, in *Mallow v. Hinde*, 12 Wheat. 198, when speaking of a case where an indispensable party was not before the court, "we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

So that, while this act removed any difficulty as to jurisdiction, between competent parties, regularly served with process, it does not attempt to displace that principle of jurisprudence on which the court rested the case last mentioned. And the 47th rule is only a declaration, for the government of practitioners and courts, of the effect of this act of congress, and of the previous decisions of the court, on the subject of that rule. *Hagan v. Walker*, 14 How. 36. It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without *affecting those rights. To use the [*142] language of this court, in *Elmendorf v. Taylor*, 10 Wheat. 167: "If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach,—as if such party be a resident of another State,—ought not to prevent a decree upon its

merits." But if the case cannot be thus completely decided, the court should make no decree.

We have thought it proper to make these observations upon the effect of the act of congress and of the 47th rule of this court, because they seem to have been misunderstood, and misapplied in this case; it being clear that the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons, and that the original bill ought to have been dismissed.

But, unfortunately, this course was not taken. The two defendants, Mrs. Shields and Bisland, answered, denying the allegations of fraud, and insisted that, so far as they were concerned, the compromise was made in good faith, and they were ready to perform their parts of it, according to their respective stipulations.

On the same day that Bisland filed his answer, he filed also a cross-bill against Barrow, praying for a specific performance of the contract of compromise.

But this bill also was fatally defective, as respects parties. Thomas R. Shields, and his other five indorsers, had such a direct and immediate interest in the contract of compromise, and that interest was so entire and indivisible, that, without their presence, no decree on the subject could be made. In *Morgan's Heirs v. Morgan*, 2 Wheat. 290, a bill was brought by the heirs of a deceased vendor, to compel the specific performance of a contract to purchase lands. It was objected that the deceased had a child who was not made a party. Chief Justice Marshall said: "It is unquestionable that all the co-heirs of the deceased ought to be parties to this suit, either plaintiff or defendant, and a specific performance ought not to be decreed until they shall be all before the court."

The next step in the pleadings was, that Barrow filed what he calls a petition, in which he recites summarily what had previously been done in the cause, and declares himself willing to have the agreement of compromise specifically performed, and prays for leave to amend his bill, by making Thomas R. Shields a party, alleging he had become a citizen of Mississippi, and by inserting the following words:—

"But if this honorable court should be of opinion, that [*143] the *said agreement of November 9, 1842, is valid, and should not be set aside; and if the said defendant shall acknowledge its validity and binding force, then the orator prays that its specific performance may be decreed, according to its true purport and tenor, as herein above explained; and he offers to do and perform on his part all the acts which, by said agreement, he is

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bound to perform ; and he prays that said defendants may be decreed to pay to him the value of the mule, negro, clothing, and flat-boats, which were taken away from the said plantation as aforesaid ; that they be decreed to relieve the said Liza, and the other above mentioned property, from the judicial mortgages mentioned in this bill, and from the tacit mortgage of the minor children of the said Thomas R. Shields ; that the said Thomas R. Shields, when made a party to this suit, both in his individual capacity and as tutor of his aforesaid minor children, may be ordered to execute a proper and legal reconveyance to your orator, of the above-described property, or that any other order may be made which, to this honorable court, may appear meet and fit, for the purpose of again vesting in the orator a good and valid title to the aforesaid property ; that the notes described in said act of November 9, 1842, and amounting to \$32,000, may be surrendered to your orator ; that the defendants may be decreed to pay to your orator the amount of such of the said last-mentioned notes as may have been drawn by them, and also such of said notes as may be indorsed by them, and which may have been protested, and of the protest of which they may have been duly notified before the final decree of this honorable court, the whole with interest from the day of protest ; and that said defendants may furthermore be decreed to pay the current expenses of the said plantation during the year anterior to said November 9, 1842, and to refund to your orator any amount and expenses which he may have been, or may yet be, compelled to pay on account of privileged claims encumbering said plantation on the day of said act."

The court allowed the above amendment. So that the bill thereafter presented, not only two aspects, but two diametrically opposite prayers for relief, resting upon necessarily inconsistent cases ; the one being, that the court would declare the contract rescinded, for imposition and other causes, and the other, that the court would declare it so free from all exception, as to be entitled to its aid by a decree for specific performance.

Whether this amendment be considered as leaving the bill in this condition, or as amounting to an abandonment of the original bill for a rescission of the contract, and the substitution of a new bill for a specific performance, it was equally objectionable.

* A bill may be originally framed with a double aspect, or [*144] may be so amended as to be of that character. But the alternative case stated, must be the foundation for precisely the same relief ; and it would produce inextricable confusion if the plaintiff were allowed to do what was attempted here. Story's Eq. Pl. 212, 213 ; Welford's Eq. Pl. 88 ; *Edwards v. Edwards*, Jacob, 335.

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Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the vice-chancellor, in *Verplanck v. The Mercantile Ins. Co.* 1 Edwards's Ch. R. 46. Under the privilege of amending, a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. See also the authorities there referred to, and Story's Eq. Pl. 884.

We think sound reasons can be given for not allowing the rules for the practice of the circuit courts respecting amendments, to be extended beyond this; though doubtless much liberality should be shown in acting within it, taking care always to protect the rights of the opposite party. See *Mavor v. Dry*, 2 Sim. & Stu. 113.

To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily encumbered with the original proceedings, increases expenses, and complicates the suit; it is far better to require the complainant to begin anew.

To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject.

After this change had been made in the original bill, and Barrow had answered the cross-bill of Bisland, the next step taken in the cause, respecting the pleadings and parties, was the entry of the following order:—

“The motion of the complainant for the delivery of the notes of George S. Guion and Van P. Winder, which have been, by order of the court, delivered into the court, to abide its further order, came on to be heard; and having been fully argued, and it appearing to the court that all the parties to the second contract set up in the complainant's bill and in the cross-bill of the defendant, Bisland, are not before the court; and it also appearing to the court that the said defendants, Shields and Bisland, are citizens of the State of [*145] Mississippi, and that all the *other parties interested in the execution of the said second contract, are citizens of the State of Louisiana, it is therefore ordered, that unless the said Shields and Bisland do, on or before the first Monday in August next, file their cross-bill, setting up and praying a specific execution of said contract, and make all the parties to the second contract, set up in the complainant's bill, and residing in Louisiana, defendants, that

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the complainant, Barrow, shall be at liberty to proceed upon his bill of complaint for a specific execution of the original contract between the parties, and for the rescission of the said second contract against such of the parties residing in the State of Mississippi as may fail to comply with this order."

The validity of this order cannot be maintained, and nothing done in consequence of it can be allowed any effect in this court.

It is apparent that, if it were in the power of a circuit court of the United States to make and enforce orders like this, both the article of the constitution respecting the judicial power, and the act of congress conferring jurisdiction on the circuit courts, would be practically disregarded in a most important particular. For in all suits in equity it would only be necessary that a citizen of one State should be found on one side, and a citizen of another State on the other, to enable the court to force into the cause all other persons, either citizens or aliens. No such power exists; and it is only necessary to consider the nature of a cross-bill, to see that it cannot be made an instrument for any such end. "A cross-bill, *ex vi terminorum*, implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill." Story's Eq. Pl. § 389; 3 Dan. Ch. Pr. 1742.

New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of the defendant requires their presence, he takes the objection of non-joinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross-bill to make new parties is not only improper and irregular, but wholly unnecessary.

When the defendants, Mrs. Shields and Bisland, had complied with this order of the court, and filed their cross-bill, as it was called, against the other indorsers and Thomas R. Shields, and they had come in, as they did, what was their relation to the cause? They surely were not plaintiffs in it. If they were defendants the court had not jurisdiction, for they, as well as *the com- [* 146] plainant, were citizens of Louisiana. In truth, they were not parties to the original bill; they were merely defendants to the cross-bill. They had no right to answer the original bill, or make defence against it, and of course no decree could be made against them upon that bill.

We do not find it necessary to pursue further an examination in

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detail, of the complicated maze of pleas, demurrers, answers, amendments, and interlocutory orders, which followed the filing of this, so called, cross-bill. It is enough to say that the defendants to it were never lawfully before the court; that the court never obtained jurisdiction over those of the parties who were citizens of the State of Louisiana, and amongst them was Thomas R. Shields, who, though made a party to the original bill by amendment, as a citizen of Mississippi, pleaded that he was a citizen of Louisiana, and was thereupon stricken out of the original bill, and was only a defendant to the cross-bill; that it never had lawfully before it such parties as were indispensable to a decree for the specific performance of the contract of compromise, or for the rescission thereof; and lastly, that when it proceeded finally to make a decree condemning certain of the defendants, who were indorsers for Thomas R. Shields, to pay the notes given on the compromise, it gave relief, for which there was a plain, adequate, and complete remedy at law, and which was wholly aside from the prayer of the bill for a specific execution of the contract of compromise, which was fully executed in this particular when the notes were given and deposited in the hands of the notary.

This court regrets that a litigation, which has now lasted upwards of thirteen years, should have proved wholly fruitless; but it is under the necessity of reversing the decree of the circuit court, ordering the cause to be remanded, and the original and cross-bills dismissed.

17 H. 478, 591; 19 H. 118; 6 Wal. 280.

ZEBEDEE RING, DAVID A. BOKEE, ROBERT S. HONE, and JOHN P. HONE, Executors of PHILIP HONE, deceased, and CORNELL S. FRANKLIN, Complainants, v. HUGH MAXWELL.

17 H. 147.

Additional duties, by way of penalty, levied pursuant to the eighth section of the tariff act of 1846, (9 Stats. at Large, 43,) are not distributable to any officers of the customs. Though the act of February 11, 1846, § 3, (9 Stats. at Large, 3,) applies, in terms, only to the additional duties levied under the seventeenth section of the tariff act of 1842, yet those levied under the eighth section of the tariff act of 1846; are only substitutes therefor in certain cases, and to be governed by the same rule as to distribution.

THE case is stated in the opinion of the court.

Ring, for the complainants.

Cushing, (attorney-general,) *contra*.

[*147] *CURTIS, J., delivered the opinion of the court.

This case comes before us, upon a certificate of division of opinion of the judges of the circuit court of the United States for the southern district of New York. The certificate shows that a suit in equity is pending in that court, wherein persons who were the naval officer and surveyor of the port of New York, are complainants, and Hugh Maxwell, who was the collector of that port, is respondent, and that the scope of the bill is to recover one moiety of a large sum of money levied and collected as additional duties, under the 8th section of the tariff act, of July 30, 1846, 9 Stats. at Large, 43, during the time while the complainants held the offices above mentioned. Upon the hearing of this cause, the judges were opposed in opinion upon the following questions:—

“Whether, upon a true construction of the revenue laws of the United States, the additional duties of 20 per centum, which have been levied and collected by and paid to the defendant, as collector of the port of New York, at the port of New York, as stated *in his answer, under and by virtue of the 8th section of [* 148] the act entitled ‘An act for reducing the duties on imports, and for other purposes,’ passed July 30, in the year 1846, were to be treated as penalties, and one moiety thereof divided between and paid in equal proportions to and among the collector, naval officer, and surveyor of the port of New York, holding said offices at the time of the levying, collection, and payment thereof, in the said port of New York, as claimed by the plaintiffs, in their bill in this cause.”

The 8th section of the act of July 30, 1846, after requiring the collector to cause the dutiable value of the imports therein referred to, to be appraised, estimated, and ascertained, in accordance with the provisions of existing laws, goes on to enact, “and if the appraised value thereof shall exceed, by ten per centum or more, the value so declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty per centum, *ad valorem*, on such appraised value.” The question is, whether the sums levied, collected, and paid under this clause, were by law distributable as penalties, one moiety to the treasury of the United States, and the other moiety among the collector, naval officer, and surveyor.

To render any sum of money collected for the government, thus distributable, it is not doubted that some act of congress, directing that distribution, must be found; and the complainant’s counsel has sought for such a law, by arguing that these additional duties must be treated as penalties, levied for the offence of undervaluation, against the directions and in contravention of the requirements of

the revenue laws; and that, if they are penalties, they are required to be distributed by different collection laws to which he has referred, and which he urges have been made applicable by congress to the sums of money now in question. We do not find it necessary to determine whether these additional duties might have been deemed penalties, so as to come under the terms of either of the collection laws which have directed the distribution of penalties among certain officers of the customs; nor do we deem it important to examine in detail, the provisions of those collection laws, and the manner in which they have been, from time to time, rendered applicable, in part or in whole, to the different acts levying duties and penalties.

Because we are all of opinion, that whatever may be the nature of the sums levied, as additional duties, under the 8th section of the tariff act of 1846, they are not distributable as penalties.

To exhibit the reasons on which this opinion is founded, it is necessary to refer first to the tariff act of August 30, 1842.¹ [* 149] The * 26th section of that act, provided that the laws existing on the 1st day of June, 1842, shall extend to and be in force for the collection of the duties imposed by this act, &c., and for the recovery, collection, distribution, and remission of all fines, penalties, and forfeitures, and for the allowance of the drawbacks by this act authorized, as fully and effectually as if every regulation, restriction, penalty, forfeiture, provision, clause, matter, and thing in the said laws contained, had been inserted in and reenacted by this act.

The 16th and 17th sections of the same act prescribe the manner in which merchandise, subject to *ad valorem* rates of duty, shall be appraised, and its dutiable value ascertained; and, then, the 17th section enacts, "that in all cases where the actual value to be appraised, estimated, and ascertained, as hereinbefore stated, of any goods, wares, and merchandise, imported into the United States, and subject to any *ad valorem* duty, or whereon the duty is regulated by or directed to be imposed or levied on the value of the square yard, or other parcel, or quantity thereof, shall exceed, by ten per centum or more, the invoice value, then, in addition to the duty imposed by law on the same, there shall be levied and collected on the same goods, wares, and merchandise, fifty per centum of the duty imposed on the same where fairly invoiced."

These being provisions of the tariff act of 1842, the complainants' argument is, that the additional duties levied under its 17th section, were made distributable by its 26th section; that the 8th section of the act of 1846 only changed the amount of the penalty in the cases it reached; that, whereas, by the 17th section of the act of 1842, if

¹ 5 Stats. at Large, 548.

the appraisement should exceed the invoice value ten per centum, fifty per centum of the duty was the penalty; by the act of 1846, twenty per centum of the appraised value was to be the penalty. that this was the only change made; although the 26th section of the act of 1842, which made penalties distributable under the then existing laws, applied, in terms, only to the penalties levied by that act, yet those laws of distribution are applicable to this penalty under the act of 1846, which must be considered as substituted in place of the penalty levied by the act of 1842, and to be governed by the same provisions of law as were applicable to the additional duty, by way of penalty, under that act of 1842.

There is great force in this argument. The tariff act of 1846 is an act fixing new rates of duty on imports. It does not contain any provisions for the collection of those duties, nor for the collection or distribution of any penalties. It does not, in terms, adopt the existing laws on those subjects, nor declare that they shall be deemed applicable to the duties and penalties which it levies; yet, [* 150] it is obvious that it must have been intended that those existing laws should be thus applied; and this can only be effected by considering the duties and penalties levied by the act of 1846, as substitutes for, and to be governed by the same rules as, the corresponding duties and penalties levied by the act of 1842, which did, in terms, adopt and apply the existing laws for the recovery, collection, and distribution of duties and penalties.

We accede, therefore, to the positions that the additional duty levied by the act of 1846, is only a substitute for that levied under the act of 1842, and that, whatever rule was in force when the act of 1846 was passed, concerning the distribution of the additional duty levied by the 17th section of the act of 1842, is also in force, and is to be applied to the additional duty under the 8th section of the act of 1846, which is here in question. So that the only remaining inquiry is, what was that rule?

We think this question is answered by the 3d section of the act of February 11, 1846, (9 Stats. at Large, 3,) "that no portion of the additional duties provided for by the 17th section of the act of August 30, 1842, entitled, &c., shall be deemed a fine, penalty, or forfeiture, for the purpose of being distributed to any officer of the customs; but the whole amount thereof, when received, shall be paid directly into the treasury."

This enacts a rule concerning the distribution of the additional duties under the act of 1842; and as the additional duties under the act of 1846 are substitutes for, and to be governed by the same rules

as to distribution, as those levied under the former law, it necessarily follows that they are not distributable.

It has been argued that this 3d section of the act of February 11, 1846, is expressly limited to the additional duties levied under the 17th section of the act of 1842; and therefore cannot govern the distribution of those levied under the act of 1846. But, so the 26th section of the act of 1842, which adopts former laws, applies them only to the duties and penalties levied under that act; and this is the only authority for applying any laws to the distribution of the penal duties now in question. The complainant is obliged to argue that, though limited in terms to that act, it applies to rates of penal duty afterwards substituted by the act of 1846, in place of those prescribed by the act of 1842. We have declared the argument sound; but it must be allowed its full and just effect. The implication is not, that the laws for the collection and distribution of penalties, as they had existed at some prior period, or as they had been applicable to other penalties, were silently adopted by the act of 1846; but that the laws for the collection and distribution of additional duties

by way of penalty, as those laws existed when the act [* 151] * of 1846 was passed, must be deemed applicable to the new additional duty by way of penalty prescribed by that act; and when the act of 1846 was passed, the previous general law for the distribution of penalties had been modified, and the additional duty, for which that in question is substituted, had been declared not distributable. The consequence is that, though the act of 1846 may be considered as providing for both duties and penalties, subject, as to their collection and distribution, to existing laws, yet, as there was no law in force by which additional duties, levied for undervaluation, were made distributable, there can be no adoption of any existing law on that particular subject, and no distribution can take place.

Perhaps this may be illustrated by supposing that the substance of the 3d section of the act of February 11, 1846, had been incorporated into the 26th section of the act of 1842, by way of proviso. So that, at the same time when the act of 1842 adopted all existing laws concerning the distribution of penalties, it had declared that the additional duties to be levied under the 17th section, should not be distributable as penalties, but should be paid into the treasury. Certainly, it could not then have been argued that the act of 1846 had merely changed the rate of additional duty, and had silently adopted the existing laws concerning its distribution, and, still, that it was distributable. Yet, the effect of this subsequent enactment, of February 11, 1846, when made, upon the act of 1842, is the same as if it

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had been incorporated therein. It is *in eadem materia*, and both are to be construed as one law, the last controlling and modifying the first, as if it made a part of it.

The fallacy of the argument, on the part of the complainants, consists in going back to former laws concerning the distribution of other penalties, and considering them to be applicable to this penalty, when the existing law, applicable in terms to a penalty *ejusdem generis*, and for which this penalty is a substitute, declares that it is not distributable.

Our opinion is, that the first question certified by the circuit court, must be answered in the negative.

There are other questions certified, but as the one above decided necessarily disposes of the case, we do not deem it needful to consider and respond to them.



THE PROPELLER MONTICELLO, JOHN WILSON, Master and Claimant,
Appellant, v. GILBERT MOLLISON.

17 H. 152.

The rule which requires a sailing vessel to keep her course, and allows a steamer to elect what manœuvre to make to go clear, applies only when there is some immediate danger of collision, if both vessels keep their course; and where a schooner and steamer on a lake, with plenty of sea room, were six miles apart, and the schooner changed her course, she was not in fault thereby.

It is not a defence to a cause of collision that the libellants have been paid a total loss by underwriters.

If the respondent makes satisfaction to the injured party, he cannot be compelled to answer again to a merely equitable owner of the claim, who must protect his own rights by intervening in the cause, either before a decree, and becoming *dominus litis*, or after the decree, while the money is in the registry.

THE case is stated in the opinion of the court.

Gillet, for the appellant.

Grant, contra.

* GRIER, J., delivered the opinion of the court.

[* 153]

The appellee in this case filed his libel in the district court for the northern district of New York, against the steam propeller Monticello, in a cause of collision.

The libel sets forth that the libellant is owner of the schooner Northwestern; that, on the 15th of September, 1850, the schooner, with a cargo of salt, was on her voyage from the port of Oswego, in New York, to the port of Chicago, in Illinois; that about half past eight o'clock in the evening, being about ten or twelve miles from

Presque Isle, on Lake Huron, and about six miles from land, sailing with a fair breeze, on the course of west-northwest, (the wind being south-southwest,) the sparks from the chimney of the propeller were seen some six miles off. In order to give a "wide berth" to the approaching vessel, the schooner ported her helm and ran her course a point more to the north. That, when from four to six miles apart, a bright light was placed in a conspicuous position on the schooner, and the vessel held steadily to her course, so that the approaching propeller might not mistake the course of the schooner. That the propeller exhibited no light, except that occasionally thrown out by the sparks from her chimney. That some time after, the master of the schooner, by close observation, discovered that the propeller was directly forward of the beam of the schooner, close upon her, and steering directly for her. He then hailed the steamboat, and ordered his helm aport, but too late to avoid the collision, which caused the schooner to sink immediately.

The answer admits that the lights of the schooner were seen when five miles off, and states that the steamboat was on a course of east-southeast, and continued on that course for a short time after seeing the light of the schooner; but that, as the schooner appeared [* 154] "far in shore," in order to give her lake room, *the propeller bore away into the lake about three quarters of a point; and that the collision was occasioned by the fault of the schooner, in not keeping her course.

The answer also alleges, as a defence, that the schooner and cargo had been insured and abandoned to the insurers, who accepted the abandonment, and had paid the insurance to the libellant, prior to the filing of the libel.

1. On the first point, as to the party to whom the fault of this collision is to be imputed, we entirely concur with the judgment of the district and circuit courts. The testimony of libellant's witnesses is consistent, and, connected with the admissions of the answer and of respondent's witnesses, is conclusive to show that the fault was in the steamboat. The master of the steamboat was not on board on that occasion; and the testimony of the mate, who had command, and by whose obliquity of vision, or want of judgment, the steamboat was so dexterously brought into collision with the schooner, attempts to excuse his conduct by a statement of facts disproved by all the other witnesses, and demonstrably incorrect. He admits that he saw the bright light of the schooner five miles off. He asserts that the schooner's light appeared on the starboard bow of the steamer; this is clearly a mistake in his statement of facts, or, if true, was occasioned by the steamer turning out of her course.

The theory of mere negligence, or inattention, will hardly account for this collision. Defendant's witnesses admit that they at one time mistook the bright light of the schooner for the Presque Isle lighthouse; and it is evident that, laboring under this delusion, they must have steered directly for the schooner's light, not discovering their mistake till it was too late to remedy it. The night, though dark, had some starlight, by which the land, some six miles off, showed itself above the horizon. With a channel and room to pass as wide as the lake, with the bright light of the schooner full in view for more than twenty minutes before the collision, it cannot be accounted for, except by the hypothesis of the active coöperation of the officers of the steamboat, caused by a delusion, under which they continued to labor in consequence of a reckless inattention to their duty.

It is contended, on behalf of respondent, that the fault of the collision is to be attributed to the schooner, because she did not keep on her course and leave the steamboat to pass as best she could, according to the rules laid down by this court in the case of *St. John v. Paine*, 10 How. 557. The answer to this argument is obvious. When the master of the schooner first observed that he was sailing on a line with the steamboat, and ordered his helm to be ported, so as to avoid being on the track of the approaching vessel, they were seven or eight miles or more apart, *not in the [*155] narrow channel, but in the wide lake. There was no immediate danger of a collision. The order was one of extreme caution; it did not tend to produce the collision, for, when the light of the schooner was first seen, five miles off, the schooner was sailing steadily on her course of northwest by north, making an angle of one point with the course of the steamer, and continued on that course till she was run down and sunk.

The rules laid down by this court for avoiding collision should be strictly adhered to, so that conflicting orders may not produce the collision instead of avoiding it. But in the present case, when the schooner changed her course, the vessels were in no danger of collision, being many miles apart in an open sea. They had not approached to that point of danger which brings the rules of the admiralty into exercise, and makes their observance necessary, in order to avoid a collision. When the steamer first discovered the light of the schooner, she was sailing steadily on the course adopted, and continued to do so, till the collision was produced by the perverse dexterity of the helmsman of the steamboat.

2. The defence set up in the answer, that the libellants have received satisfaction from the insurers, cannot avail the respondent. The contract with the insurer is in the nature of a wager between

third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law and received in courts of admiralty. See *Yates v. Whyte*, 4 Bing. N. C. 272; *Phillips on Insurance*, 2163; *Abbott on Shipping*, 318.

It is true, that in courts of common law the injured party alone can sue for a trespass, as the damages are not legally assignable; and if there be an equitable claimant, he can sue only in the name of the injured party; whereas, in admiralty, the person equitably entitled may sue in his own name. But the same reasons by the wrongdoer cannot be allowed to set up as a defence the equities between the insurer and insured, equally apply in both courts. The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit, at the instance of any merely equitable claimant. If notified of such a claim before payment, he may compel the claimants to interplead; otherwise, in making reparation for a wrong done, he need look no further than to the party injured. If others claim a right to stand in his place, they must intervene in proper time, or lose their recourse to the respondent.

[* 156] * The insurer may at all times intervene in courts of admiralty, if he has the equitable right to the whole or any part of the damages. Under the 34th rule in admiralty of this court, he may be allowed to intervene, and become the *dominus litis*, where he can show an abandonment, which divests the original claimant of all interest. See 1 Curtis's R. 340. Under the 43d rule also he may intervene after decree, and claim the damages recovered, by showing that he is equitably entitled to them. But with all this the respondent has no concern, nor can he defend himself by setting up these equities of others, unless he can show that he has made satisfaction to the party justly entitled to receive the damages.

The judgment of the circuit court is therefore affirmed, with costs.

DANIEL, J., dissented.

In the cases of *The Propeller Monticello v. Mollison*, in admiralty, and in those of *Clapp v. The City of Providence*, and of *The Bank of Tennessee v. Horn*, I dissent from the opinion and decision of this court; not upon the merits of those cases, but upon the ground of a want of jurisdiction in this court to adjudicate them. The reasons for my objection to the jurisdiction of this court, in cases like those

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above mentioned, have been so frequently assigned in preceding instances before this court, that a repetition of them, on the present occasion, is deemed superfluous. My purpose is simply to maintain my own consistency in adhering to convictions which are in nowise weakened. 19 H. 812; 1 Wal. 43; 3 Wal. 257; 6 Wal. 216.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF TENNESSEE, Plaintiffs in Error, v. LEWIS B. HORN.

17 H. 157.

A statute of Louisiana having provided that all the property of an insolvent debtor shall be deemed vested in his creditors from and after the acceptance of a cession thereof, a judgment recovered in the circuit court of the United States, after that day, gave no lien on land of the debtor, even though it was misdescribed in the schedule of his effects.

THE case is stated in the opinion of the court

Dunbar, (with whom were *Stockton* and *Steele*,) for the plaintiffs.

Janin, contra.

* TANEY, C. J., delivered the opinion of the court. [* 159]

The facts in this case, as they appear on the record, are as follows : —

Peter Corney, Jr., who resided in New Orleans, on the 7th of November, 1851, filed a petition under the insolvent law of Louisiana, in the second district court, declaring his inability to meet his engagements, and praying that a cession of his property might be accepted by the court, for the benefit of his creditors, and that in the mean time all proceedings against him should be stayed. To this petition, a schedule of his property * was annexed, in which [* 160] it is apparent that the lot in question was intended to be included, but which is so erroneously described that it can hardly be identified, by the schedule alone, as a part of his estate.

The district court, on the day the petition was presented, accepted the cession, and ordered a meeting of the creditors on the 13th of December following. The meeting was held accordingly, and a syndic appointed, and a report of the proceedings made to the court. On the 8th of March following, the court authorized a sale of the property now in dispute, by the syndic; and at that sale, in May, 1852, the defendant in error became the purchaser.

The insolvent, at the time of his petition, was indebted to the bank, the plaintiff in error, in a large sum of money, for which a suit was then pending in the circuit court of the United States for the eastern

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district of Louisiana. The bank proceeded in its suit and obtained judgment; but the judgment was rendered after the cession had been accepted and the syndic appointed by the creditors. The bank, however, issued an execution, under which this property was seized by the marshal, in February, 1852, and sold in the April following. The bank was the purchaser at this sale, and obtained possession of the lot under it.

The defendant in error, after his purchase from the syndic, brought suit for the premises, and upon a trial in the circuit court of the United States for the eastern district of Louisiana, recovered a judgment; the court being of opinion that the property in question vested in the creditors, upon the cession and acceptance above mentioned, and was not liable to seizure under the execution which issued upon the judgment afterwards obtained by the plaintiff in error.

By an act of the legislature of Louisiana, passed on the 29th of March, 1826, all the property of an insolvent petitioner mentioned in his schedule is fully vested in the creditors, from and after the cession and acceptance; and the syndic is directed to take possession of it, and to administer and sell it, for the benefit of the creditors. At the time, therefore, when the bank obtained judgment against Corney, the insolvent, he had no interest in the lot in question upon which the judgment could be a lien, or which could be seized upon, on execution issuing on that judgment. The right and title to it had, by operation of the law of the State, vested in the creditors, to be administered by the syndic, as their trustee.

Nor can the imperfect or erroneous description in the schedule have any influence on the decision. For it is well settled, by decisions of the courts of Louisiana, that all the property of the insolvent, whether included in his schedule or not, passes to his [* 161] * creditors by the cession. 4 Ann. Rep. 492, 493; 11 Louisiana, 521; 8 Rob. 128; 9 *ibid.* 223. Consequently, if, under the ambiguous or erroneous description in the schedule, this lot must be regarded as omitted, it still passed by the cession, and Corney had no remaining interest in it.

Neither can there be any constitutional objection to this law of the State. The validity of a state law of this description has been fully recognized in the case of *Peale v. Phipps and others*, 14 How. 368, and in the previous cases therein referred to, and cannot now be considered as an open question.

We see no error, therefore, in the judgment of the circuit court, and it must be affirmed.

17 H. 152; 23 H. 90.

THE CITY OF PROVIDENCE, Plaintiff in Error, v. DANIEL R. CLAPP
17 H. 161.

The act of Rhode Island, which requires towns to keep highways, &c., in repair, &c., applies to the sidewalks of cities, and to obstructions occasioned by snow and ice thereon; and it is a question for the jury, whether, having regard to the amount and kind of use of the way, it was reasonably safe and convenient.

THE case is stated in the opinion of the court.

Ames, for the plaintiff.

Jencks, contra.

* NELSON, J., delivered the opinion of the court. [* 165]

This is a writ of error to the circuit court of the United States for the district of Rhode Island.

The suit was brought in the court below against the city of Providence, to recover damages for an injury occasioned by an obstruction on the sidewalk in one of its principal streets. The obstruction consisted of a ridge of hard-trodden snow and ice on the centre of the sidewalk, along which the plaintiff was passing in the night time, and by means of which he fell across the ridge, breaking his thigh-bone in an oblique direction.

After the evidence closed, the counsel for the defendants *prayed the court to charge the jury that the statutes [* 166] of Rhode Island, requiring highways to be kept in repair, and amended from time to time, so that the same may be safe and convenient for travellers at all seasons of the year, as far as respected obstructions from falls of snow, merely required that the snow should be trodden down or removed, so that the highways should not be blocked up or encumbered with snow; but did not require that said highways should be free from snow or ice, so that the traveller should not be in danger of slipping thereon; and that the said snow, being so trodden down and hardened into ice, and the sidewalk not blocked up or encumbered therewith, but open and passable in the sense of the statute, in this case the defendants were not liable.

The counsel for the defendants, also, after referring to the statutes authorizing the city of Providence to build and repair sidewalks, and also to the ordinances of the city passed in pursuance thereof, further prayed the court to charge, that neither the said statutes nor the ordinances defined or enlarged the duty or liability of the city as to the removal of snow from the sidewalks, beyond that under the general statute of the State, nor were they evidence of the degree of care

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required of the city by the general statute ; but that, notwithstanding the same, the city would not be liable under the general law, if the snow on the sidewalk was trodden down so as to be open and passable.

The court refused so to charge ; but charged, that, by the statute law of the State, the city was obliged to keep this street conveniently and safely passable at all seasons of the year ; that, by a special act, the legislature having authorized the city to have sidewalks designed for foot passengers, it was bound to keep those sidewalks convenient and safe for pedestrians ; that the law did not require absolute convenience or safety, but safety and convenience in a reasonable degree, having reference to the uses of the way and frequency of its uses ; that, when a fall of snow takes place, so as to render a sidewalk not conveniently and safely passable, it was the duty of the city to use ordinary care and diligence to restore it to a reasonably safe and convenient state. That the law does not prescribe how this shall be done, whether by treading down or removing the snow ; and that it was for the jury to find, as matter of fact, whether the sidewalk, at the time in question, was in a reasonably safe and convenient state, having reference to its uses ; and if it was not so, whether its want of safety and convenience was owing to the want of ordinary care and diligence on the part of the city ; and in considering whether due diligence required the city to remove the snow, the jury ought to take into consideration the ordinances, not as prescribing a rule [* 167] binding on the city, but as *evidence of the fact that a removal, and not a treading down of the snow, was reasonably necessary.

The 1st section of the statute of Rhode Island concerning highways and bridges, provides, " that all highways, town-ways, and causeways, &c., lying and being within the bounds of any town, shall be kept in repair and amended, from time to time, so that the same may be safe and convenient for travellers, with their teams, &c.," at all seasons of the year, at the proper charge and expense of such town under the care and direction of the surveyor or surveyors of highways appointed by law. The surveyors are then authorized to remove all sorts of obstructions or things that shall in any way straiten, hinder, or incommode any highway or town-way, and when blocked up or encumbered with snow, they shall cause so much thereof to be removed or trod down as will render the road passable.

Among other provisions conferring upon the towns power to repair and amend the public highways, the 4th section enacts that each town, at some public meeting of the electors, shall vote and raise such sum of money, to be expended in labor and materials on the

highways, as they may deem necessary for that purpose ; and either the assessors or the town council, as the town may direct, shall assess the same on the ratable estate of the inhabitants, and all others owning ratable property therein, as other town taxes are by law assessed.

And the 13th section provides, that if the town shall neglect to keep in good repair its highways and bridges, she shall be liable to indictment, and " shall also be liable to all persons who may in any-wise suffer injury to their persons or property by reason of any such neglect."

It is admitted that the defendants are not liable for the injury complained of at common law, but that the plaintiff must bring the case within the above statute to sustain the action. It must also be admitted, that the act applies to cities as well as towns, and also to sidewalks where they constitute a part of the public highway. This has been repeatedly held by the state courts in several States, under statutes substantially like the one under consideration. 13 Pick. 343 ; 13 Met. 297 ; 3 Cush. 121, 174 ; 4 *ibid.* 247 ; 6 *ibid.* 141, 524 ; 7 Greenl. 442 ; 15 Verm. 708 ; 19 *ibid.* 470 ; 21 *ibid.* 391 ; 2 N. Hamp. 392 ; 35 Maine, 100 ; *ibid.* 242.

The counsel for the defendants, conceding this view of the statute, and of the liability of the city generally, contends that, as it respects obstructions or impediments occasioned by the fall of snow, and accumulations of ice, the liability is qualified, and exists only in case of neglect to tread down or remove the snow, so that the track be not blocked up and encumbered thereby ; and that, if the street or sidewalk is passable by not being *blocked up and [*168] encumbered with snow, as it respects this kind of obstruction, it is made safe and convenient within the meaning of the statute. And the latter clause of the 1st section of the act which directs that when the highways are blocked up or encumbered with snow, the surveyor shall cause so much thereof to be removed or trod down as will render the road passable ; and also the 13th and 14th sections, which authorize the towns to impose penalties for the removal of snow from highways, and subjects the town to an indictment for neglect therein, are referred to as countenancing this modified liability.

But it will be found, on looking into the several decisions under a similar act in Massachusetts, that no distinction exists between obstructions of a public highway by falls of snow, and those of any other description. In the case of *Loker v. Brookline*, 13 Pick. 346, 347, Morton, J., speaking of the 1st section of the statute, observes, that language so general and explicit, cannot be misunderstood or

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restrained. It must extend to all kinds of defects, as well as to all seasons of the year ; and an obstruction caused by snow is as clearly included as one caused by flood, or tempest, or any other source of injury. See also 13 Met. 297 ; 6 Cush. 141.

The foundation of the action rests mainly on the 1st and 13th sections of the statute. The 1st imposes upon the town the duty of keeping in repair and amending the highways within its limits, so that the same may be safe and convenient for travellers at all seasons of the year ; and the 13th declares, that if the towns shall neglect to keep in good repair its highways and bridges, it shall be liable to indictment, and shall also " be liable to all persons who may in anywise suffer injury to their persons or property by reason of any such neglect."

The other provisions, and among them those referred to by the counsel, relate to the powers conferred upon the towns to enable them to fulfil the obligations enjoined, and to the powers and duties of the several officers having charge of the repairs of the highways. Ample means are furnished the several towns to discharge their obligations under the statute.

The act of 1821, amended by the act of 1841, confers powers upon the city of Providence, to build and keep in repair their sidewalks, at the expense of the owners of the adjoining lots ; and as may be seen from the several ordinances of the city, given in evidence, these powers have been liberally exercised for the purpose.

The powers of the towns and of the city are as ample for the purpose of removing obstructions from the highways, streets, and sidewalks, arising from falls of snow and accumulations of ice, as those [* 169] arising from any other cause ; and the reason for * the removal, so that they may be safe and convenient for travellers, is the same in the one case as in the others. The 13th section of the act which gives the personal remedy, makes no distinction in the two cases ; and, in the absence of some plain distinction pointed out by the statute, it would be exceedingly difficult, if not impossible, to state one. It is conceded that an obstruction, from falls of snow or accumulations of ice, must be removed by the towns and cities, so as to make the highways and streets passable ; and that this is a duty expressly enjoined upon them. The question is, what sort of removal will satisfy the requirement of the statute ? It is admitted that, as it respects every other species of obstruction, the repairs must be such that the highways and streets may be safe and convenient for travellers ; and that this is a question of fact to be determined by the jury. Is an obstruction by snow or ice to be determined by any other rule, or by any other tribunal ? The counsel for the defendants

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suggests, that as it respects such safety and convenience for travellers in case of falls of snow, the statute should be construed as meaning merely that the snow should be trodden down or removed, as that the highways and streets should not be so blocked up or encumbered as not to be safely and conveniently open and passable. But it is quite clear that this would be a very indefinite and uncertain rule to guide either the officers, whose duty it is to remove these obstructions, or the jury in passing upon them when the subject of legal proceedings. The suggestion may be very well as an argument to the jury, for the purpose of satisfying them that the repairs in the manner mentioned were such as to fulfil the requirement of the statute, but to lay it down as a rule of law in the terms stated, might in many cases, and under the circumstances, fall far short of it.

The treading down of snow when it falls in great depth, or in case of drifts, so that the highway or street shall not be blocked up or encumbered, may in some sense, and for the time being, have the effect to remove the obstruction; but as it respects the sidewalks and their uses, this remedy would be, at best, temporary; and, in case of rains or extreme changes of weather, would have the effect to increase rather than remove it. It is but common observation, and knowledge of those familiar with the climate of our northern latitudes, that not unfrequently the most serious obstructions arise from the great depth of snow and changes in the temperature of the weather; and that simply treading down the snow, and leaving it in that condition without further attention, would have the effect to render the highways and sidewalks utterly impassable.

In the case also of obstructions from snow, the sidewalks may * frequently require its removal, so as to make a [* 170] safe and convenient passage for the pedestrian, when, at the same time, the treading of it down in the street would answer the purpose for the traveller with his team. The nature and extent of the repairs must necessarily depend upon their location and uses; those thronged with travellers may require much greater attention than others less frequented.

The just rule of responsibility, and the one, we think, prescribed by the statute, whether the obstruction be by snow or by any other material, is the removal or abatement so as to render the highway, street, or sidewalk, at all times safe and convenient, regard being had to its locality and uses.

We are satisfied the ruling of the court below was correct, and that the judgment should be affirmed.

Daniel, J., dissented.

17 H 152; 1 B. 89.

The Schooner Catharine v. Dickinson. 17 H.

THE SCHOONER CATHARINE, her Tackle, &c., STARKS W. LEWIS and others, Owners and Claimants, Appellants, v. NOAH DICKINSON and others, Libellants.

17 H. 170.

When a vessel, injured by collision, is run on to a beach, bilged, and afterwards raised and repaired, the measure of damages is the cost of raising and restoring her to as good a condition as she was in at the time of the injury; in such a case, the owner cannot sell her, as she lies, deduct the price from the value before the collision, and recover the difference.

It is not an excuse for want of a proper look-out in the night, in a place much frequented by vessels, that all hands were employed in reefing, there being no unusual emergency. A vessel closehauled, meeting one having the wind free, luffed; *held*, to be in fault for not keeping her course.

If both vessels are in fault, the loss by collision is to be divided.

THE case is stated in the opinion of the court.

Cutting, for the appellants.

Field, contra.

[* 173] * NELSON, J., delivered the opinion of the court.

This is an appeal in admiralty from a decree of the circuit court of the United States for the southern district of New York.

The libel charges, that on the night of the 21st April, 1852, the schooner San Louis, laden with a cargo of stone, was sailing down the coast below the bay of New York, bound for Philadelphia, and while off Squam Beach, on the Jersey shore, the schooner Catharine, coming up the coast, bound for the port of New York, then and there with great force and violence ran into and upon her, breaking through her side, so that she soon filled with water, and sunk. That The Catharine had a fair wind and ample sea-room, while The San Louis was beating against the wind, and was inside of The Catharine, and standing off the shore. That The Catharine had no watch or person on the look-out at the time of the collision; and that it was occasioned by the improper and unskilful management of the persons on board engaged in navigating her. That she luffed, and struck The San Louis about midships with head on.

The answer of the respondents, owners of The Catharine, admit The San Louis was sailing down the coast at the time and place mentioned; and that The Catharine was coming up the same, bound for the port of New York; but deny that she ran into The San Louis; but charge that she ran across and afoul of the bows of The Catharine, which occasioned the collision; that the wind was in a quarter that enabled The San Louis to keep her course full down

the coast without keeping off shore; they insist that The Catharine had the usual watch set before and at the time of the collision; and they deny that it was occasioned by reason of the unskilfulness or mismanagement of those on board of her, but was the result of want of care, and mismanagement in navigating The San Louis. They deny that * The Catharine luffed, as charged [* 174] in the libel; but charge that The San Louis luffed and came across the bows of The Catharine.

The district court rendered a decree for the libellants and referred the question of damages to a commissioner. The decree was affirmed in the circuit court. The proofs before the commissioner, to ascertain the amount of the damages, consisted principally of testimony as to the value of The San Louis previous to the collision; and as to her estimated value in her sunken and disabled condition in the water on the beach; the difference constituting the measure of damages allowed. She was sold by one of the owners, a few days after the accident, while lying on the beach, for \$140; and which, upon the weight of the proofs as produced, was her then estimated worth. Her cargo of stone was afterwards taken out, and the vessel raised and brought to the port of New York and repaired. The expense of raising and repairing her seems not to have been a subject of inquiry.

The commissioner reported damages to the amount of \$6,200, which report was confirmed.

1. As to the damages.

The principle that appears to have governed the examination of the witnesses in respect to this branch of the case, as well as the commissioner in arriving at the amount of damages reported to the court, we think, upon consideration, is not maintainable. That principle seems to have been, to ascertain from the opinion of witnesses, experts as they are called, though it is not clear they were of that character, the value of the vessel in her sunken and disabled condition as she lay on the beach after the disaster, and to deduct that sum from the sound value before it occurred, the difference being the measure of the damage; in other words, that the inquiry must be confined to the condition of the vessel at the time of the collision, and in her then state; that the owner had a right to abandon her as a total loss, and look to the wrongdoer for compensation, as then estimated. Acting upon this view, the libellants sold the vessel in her disabled state for what they could get, and claimed, and have received, the sound value, less this amount.

It is true that where a vessel has been run down and abandoned, never having been raised and repaired, but left to decay upon the beach, evidence of the nature and character of that given in this case

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must necessarily be admissible. That is, the damage sustained must be ascertained by the testimony of witnesses experienced in matters of this kind, who are competent to speak as to the practicability of raising and repairing the vessel, and of the expense attendant thereupon, this expense constituting the principal ingredient of [*175] the damage proper to be * allowed; but they should be witnesses whose occupations and experience enabled them to express opinions of the feasibility of raising the vessel, and to make estimates of the probable expense of the same; and, also, of the expense of the necessary repairs, upon which the court might rely with some confidence in making up its judgment. Loose general opinions on the subject, entitled to very little more respect in the ascertainment of facts than the conjectures of witnesses, are of themselves undeserving of consideration.

But where the vessel has been raised and repaired, or is undergoing repairs, as in the case of *The San Louis*, there is no necessity for resorting even to the opinion and estimates of experts, as to the probable expenses, for as to these the reasonable expenses incurred in raising and repairing her are matters of fact that may be ascertained from the parties concerned in the work. The libellants, instead of the examination of witnesses, as to their opinion of the amount of the damage from an inspection of the vessel as she lay upon the beach, should have inquired into the actual cost of raising and repairing her, so as to have made her equal to the value before the collision. This would have been the proper mode by which to have arrived at an indemnity to the extent of the loss sustained, which is the true measure of damages in these cases. 13 How. 101-110.

We think, therefore, that the rule adopted in ascertaining the measure of damages in this case was erroneous.

The next question in the case is more difficult.

The New Jersey coast below Sandy Hook bears southwesterly and northeasterly, along which these vessels were sailing. The wind was southwesterly, a pretty strong breeze; *The San Louis* closehauled, passing down the coast, and *The Catharine* with the wind free passing up it, making for the Hook. There had been a fall of rain during the evening, but between eight and nine o'clock, when the collision happened, the weather had partially cleared up. The night was cloudy, but some stars were visible. *The San Louis* was sailing at the rate of six knots the hour; and as *The Catharine* had the wind free, her speed must at least have been equal if not greater.

The master of the schooner *Goodspeed*, which vessel was in company with *The San Louis* from Jersey City, states that a schooner, which it is admitted was *The Catharine*, passed him a little after

eight o'clock, some quarter of a mile to the windward, heading to the westward of her course to the Hook, which was in shore; that at this time The San Louis was from three quarters to a mile astern of him, a little to windward. The Catharine had a light; The San Louis had not.

Messick, the look-out on The San Louis, states that he saw * The Catharine half a mile ahead; he supposes about [* 176] half a point on their lee bow. "I suppose," he says, "when I first saw The Catharine she was heading to the northward. I sung out to the mate at the helm to luff; he did so, and brought The San Louis into the wind; that The Catharine then luffed also, and ran into us abaft the chains."

Now, if the master of The Goodspeed is not mistaken, and he is an indifferent witness, it is difficult readily to assent to the statement of Messick as to the relative position of the two vessels; for if The Catharine passed The Goodspeed half a mile to the windward, and The San Louis was astern, nearly in the track of the latter, it is not very probable that, in the short distance she had to pass in her course before meeting The San Louis, she had so far diverged to the leeward as to overcome this half mile, and to have crossed her track. The vessels must have met at least within half a mile from the point where The Catharine passed The Goodspeed. The master of The Goodspeed says The Catharine was not only half a mile to the windward, but that she was heading to the west of her course to the Hook.

According to the settled rules of navigation, it was the duty of The San Louis, when she first saw The Catharine, which had the wind free, she being closehauled, to have kept on her course; the manœuvre of luffing into the wind, as soon as she saw that vessel, was improper, and subjects her to the charge of unskilful navigation, unless justified by special circumstances existing at the time. Here, the circumstances tend rather to aggravate than justify the error, as the improper manœuvre may have led to the collision, and probably did, if The Catharine at the time was to the windward.

Williams, the mate of The San Louis, who was at the wheel, differs materially in his testimony from Messick. He states when he first saw The Catharine, "he spoke to the man at the bow; he said, keep your course and you will go clear. I did keep my course; asked the man at the bow if he could see her; he said that he could; he told me to keep my course; I did not alter my course; steered as close to the wind as I could; did not see much more of The Catharine till she struck us." He further states, that when about three rods from The Catharine, she luffed and was coming into them; that he then put his wheel down.

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If this account of the management of *The San Louis* could be confidently relied on, there would be no great difficulty in charging the other vessel with the fault of the collision. But it is admitted that Messick was the proper person, under the circumstances, to give the orders to the mate at the wheel. Williams himself assumes this in his testimony; and Messick is very particular as to the orders given. On his cross examination he says: "I saw *The Catharine* across one point of the bowsprit, inside the stays; right away then I gave the mate the order to luff; he did it right away. She minded her helm readily."

The difference is very material; for whether fault or not is to be imputed to *The San Louis*, depends upon the fact whether she is chargeable with the manœuvre testified to by the look-out. We think, under the circumstances in which he was placed, his account of the transaction is entitled to the most weight. Having given the order, and seen that it was obeyed, and being at the time in charge of the navigation of the vessel, he cannot well be mistaken. Even the contradiction between the two witnesses is calculated to cast a doubt over the proper management of the vessel in the emergency.

The order to luff, itself, was a clear violation of the duty of *The San Louis*; but, in this instance, if the master of the *Goodspeed* is not mistaken, it probably produced the disaster. As to *The Catharine*, we are not satisfied that she had a proper look-out on the vessel at the time of the collision. The excuse given is, that all hands, a short time previously, had been called to reef the sails, and some evidence is given to prove that this is customary on vessels of this description. However this may be in the daytime, we think that such custom or usage cannot be permitted as an excuse for dispensing with a proper look-out while navigating in the night, especially on waters frequented by other vessels. Under such circumstances, a competent look-out, stationed upon a quarter of the vessel affording the best opportunity to see at a distance those meeting her, is indispensable to safe navigation, and the neglect is chargeable as a fault in the navigation.

Our opinion, therefore, is, that the decree below was erroneous, and should be reversed.

Upon this view of the case, it becomes necessary to settle the rule of damages in a case where both vessels are in fault.

The question, we believe, has never until now come distinctly before this court for decision. The rule that prevails in the district and circuit courts, we understand, has been to divide the loss. 9 Law Rep. 30.

This seems now to be the well-settled rule in the English admi-

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ralty. *Petersfield v. The Judith*, Abbott on Sh. 231, 232; *The Celt*, 3 Hagg. 328, n.; *The Washington*, 5 Jurist, 1067; *The Fiends*, 4 E. F. Moore Rep. 314, 322; *The Seringapatam*, 5 Notes of Cases, 61, 66; *Vaux v. Salvador*, 4 Ad. and Eli. 431; *The Monarch*, 1 Wm. Rob. 21; *The De Cock*, 5 Monthly Law Mag. 303; *The Oratava*, 5 *ibid.* 45, 362.

Under the circumstances usually attending these disasters, [* 178]
 * we think the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation. 21 H. 184.

JAMES B. PECK, WILLIAM HEILMAN, and EDWIN H. FRESMUTH, Owners of the Steamship Columbus, Appellants, v. JOHN SANDERSON, Libellant.

17 H. 178.

Though it is a rule that a sailing vessel should keep her course when approaching a steamer, and it is the duty of the latter to keep out of her way, yet this does not apply to a case where the steamer was not in fault for not seeing the sailing vessel till they were too near to allow the steamer to change her course; in such a case, the steamer having stopped, as soon as the sailing vessel was discovered, and being in the act of backing when the collision occurred; was held to be in no fault.

APPEAL from the circuit court of the United States for the eastern district of Pennsylvania. The case is stated in the opinion of the court.

Cutting, for the appellants.

J. M. Rush, contra.

TANEY, C. J., delivered the opinion of the court.

This case arises out of a collision between the schooner *Mission*, of Edenton, in North Carolina, and the steamship *Columbus*, of Philadelphia. The schooner sunk immediately, * and all [* 179] on board perished, with the exception of Wilson G. Burgess, a seaman, who succeeded in getting on board of *The Columbus*. The libel is filed by the owner of the schooner, and charges that the collision was occasioned by the fault of the steamship. The circuit court sustained the libel, and directed the respondents to pay the full value of *The Mission* and her cargo. And from that decree this appeal has been taken.

The only witness examined by the libellant is the seaman above mentioned. It appears from his testimony that the schooner was bound from Rum Key to Edenton, with a cargo of salt and some

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specie. The crew consisted of the captain, one mate, two able and one ordinary seamen, a cook, and a son of the captain, about twelve years old. About 12 o'clock, on the night of the collision, Burgess, and a seaman named Brown, and the master, came from below, it being their watch on deck. The master soon went below again, and remained there till after the collision, leaving no one on deck but the two seamen. Brown took the wheel and Burgess went forward; and at two o'clock in the morning, Burgess took the wheel and Brown went forward. Burgess states that it was a pretty clear night, with a moderate wind from northwest, the schooner heading north by east. The sails were trimmed flat aft; and the schooner was as closehauled to the wind as she could be. He could see nothing on the larboard side, because the sails intercepted his view. She carried no lights.

He had been at the wheel about half an hour when the collision took place. He heard a heavy crash; the wheel turned, flew out out of his hands, and knocked him down. He ran forward, and saw a large vessel into them. Her bowsprit was between the schooner's jib and foremast, and extended over their forecastle deck. He got hold of her bowsprit shroud and got upon her deck. The schooner went down, and the rest of the crew perished.

Burgess states that he neither saw nor heard the steamer until the vessels came together. The Columbus was on the larboard side, and the sails of the schooner prevented him from seeing her. He never saw or heard Brown after he went forward, and he gave the witness no notice of the approach of the steamship.

On the part of The Columbus several witnesses were examined, and among them the mate, a seaman stationed on the look-out, and the engineer. There is no material discrepancy in their testimony, and the result of it is this:—

The steamship was a propeller, and a regular packet between Philadelphia and Charleston. She was on her voyage from the former place to the latter, with freight and passengers on board.

On the night of the collision, it was the mate's watch, [*180] from *twelve o'clock to four o'clock in the morning. He came from below at twelve o'clock, and saw that his men were keeping a look-out forward, and was also on the look-out himself. The wind was west-northwest, varying one or two points, and the steamer was heading southwest, and going at the rate of about eight and a half knots an hour. There was a heavy head sea, and the night was starlight, but not very clear, somewhat hazy. The ship carried a signal-light, (a globe lamp,) such as they usually carried, which was burning, and all the state-rooms were lighted. These lights could be seen from a distance, variously estimated by the wit-

nesses from one to five miles. Her usual watch were on deck; two of them stationed on the forecastle deck on the look-out, and the mate was standing on the top of the skylight looking out for Cape Look-out light, the ship being then about ten miles from Cape Lookout breakers, and on soundings.

The Mission was first seen by one of the look-out, who immediately ran aft two or three steps, and sang out, "vessel right ahead." She was then at a distance of two or three hundred yards. And on such a night, a vessel like The Mission, with her sails hauled flat aft, and coming towards The Columbus edge on, and without lights, could not be seen at a greater distance.

The mate, as soon as the look-out cried "sail right ahead," jumped from the skylight, ordered the engineer to stop the engine, and ran forward. He saw The Mission a point or a point and a half on the larboard bow, apparently standing west by north, distant, as he conjectured, about two hundred yards. He could not see her very plain, her sails being presented to them edgewise. She was rather to windward of the steamship, and closehauled. He judged that he could not clear her by shifting the helm, and he ordered the engineer to back. The orders were instantly obeyed, and The Columbus was backing when the collision took place. It took place in less than a minute from the time the schooner was first seen.

The witnesses testify, that when at night the look-out cries out, "sail ahead," it is the duty and practice of steam vessels, when they are uncertain of the way the sail is standing, to stop the engine and back; and it is not usual or proper to change her course, before the course which the other vessel is steering is first ascertained. And among the witnesses who thus testify, is a seaman who had been a pilot in the Bay of Delaware many years, and who happened to be on board The Columbus as passenger when this disaster happened.

Upon this statement of facts, gathered from the testimony on both sides, we see no just ground for imputing this unfortunate collision to negligence or want of skill in the management of The * Columbus. She was well lighted, and could be seen at a [*181] great distance. She had a sufficient look-out, properly stationed.

But it is said it was a starlight night, and if the look-out had been watchful, The Mission ought to have been seen at a greater distance. Undoubtedly, there are nights in which such a vessel might be seen much further off; and in the night of which we are speaking, she might have been seen at a greater distance, if the whole breadth of her sails had been presented to the approaching vessel. But there are nights which may properly be called starlight, when there is a

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haze on the surface of the ocean which obstructs the vision. And the court cannot undertake to say, that in any night, whenever the stars are shining, a vessel like *The Mission* may be seen at a greater distance than two or three hundred yards, although she is approaching head on, with her sails drawn flat, and without a light. The distance must depend on the state of the atmosphere, and vary with it. And no one can know or form a safe opinion as to the distance at which the schooner might have been seen, on the night of which we are speaking, unless he was at the place of collision at the time it happened, or derives his knowledge from persons who were there. And when the witnesses on board *The Columbus* testify that she could not be seen further off, there is no reasonable ground for doubting the truth of their testimony. It is a fact, proved by eye-witnesses, whose testimony is not impeached.

Neither can the order to stop the engine and back, instead of changing the course of the steamship, be regarded as a fault. It would evidently have been unwise to change her course, until the course of the approaching vessel was ascertained. She might be approaching at an angle that would clear the steamship, and a change in the course of the latter might produce a collision instead of preventing it. And stopping the engine lessened the rapidity with which the vessels were nearing each other, and gained time, while he was ascertaining the distance of the sail, and the direction in which it was steering. When he had done this, if there was sufficient distance between them to enable him to avoid her, it was unquestionably his duty to change the course of *The Columbus*, and allow the schooner to pass on, in the course in which she was steering. But, in his judgment, this could not be done.

The testimony shows that he was an experienced and trustworthy seaman. And there is no evidence to impeach the correctness of his opinion in this particular. And if it was impossible to avoid the schooner, by changing the course of his vessel, the order to back was evidently judicious, as it gave more space for the schooner to change her course, and thereby escape the impending danger. Her [*182] course could be changed in a much *shorter space than that required for a steamship of the size of *The Columbus*.

It is, without doubt, the general rule, that a sailing vessel should keep her course when approaching a steamboat, and it is the duty of the latter to keep out of her way. But this rule presupposes that the steamer discovered, or ought to have discovered, the sailing vessel, when at a sufficient distance to avoid her, by changing her own course. But where, as in the present case, they are brought suddenly and unexpectedly close to each other, and the ordinary rules of navi-

gation will not prevent a collision, it is the duty of each to act according to the emergency, and to take any measure that will be most likely to attain the object. Experienced seamen testify that the mode adopted on the part of *The Columbus* was the usual and best one; and we see no reason to doubt it. And if *The Columbus* had been seen from *The Mission* when the engine was stopped, she might, it appears, have passed her in safety. Not a moment appears to have been lost on board of the steamer, in giving or in executing the orders which the occasion called for; and we think she is not, in any degree, responsible for the disaster.

In this view of the case, it is unnecessary to inquire whether any blame can be attached to *The Mission*. • For whether she was or was not managed unskilfully or negligently, *The Columbus*, not being in fault, is not liable for any damage sustained by the schooner.

But yet it is evident that there was great negligence on her part. For it is impossible that a vessel, lighted up like the steamer, would not have been seen from the schooner before she actually came in collision, if there had been ordinary care and watchfulness on board. It may indeed have happened that Brown, who went forward as the look-out, fell overboard by some accident, without the knowledge of Burgess, before *The Columbus* was in sight; and so, the want of a look-out might have been occasioned by misfortune, and not by carelessness. But the conduct of the captain, in going below during his watch, and not remaining on deck to see that the seamen were at their posts and attending to their duty, was hardly consistent with good seamanship. And it is difficult to believe that the approach of the steamer could be unknown to Burgess, who was at the helm, until the actual collision, unless he was asleep at his post. The sails of his vessel might have hid the lights, but it is hardly credible that a wakeful and watchful seaman at the wheel, would not have heard the noise of her machinery before he felt the collision. We do not, however, pursue this inquiry, because it is not material to the decision. And as, in the opinion of the court, no fault is imputable to *The Columbus*, the *decree of the circuit court must be [*183] reversed, and the libel dismissed.

Iasigi v. Brown. 17 H.

JOSEPH LASIGI and THOMAS A. GODDARD, Plaintiffs in Error, v.
JAMES BROWN and THOMAS B. CURTIS, Trustee of said BROWN.¹

17 H. 183.

The defendant having written a letter to his agent, headed "confidential," and the agent having shown it to the plaintiffs, in an action for a false representation made by the letter, it was held to be a question for the jury whether the defendant intended his agent should exhibit the letter.

THE facts upon which the opinion of the court rested, are stated therein.

Bartlett, for the plaintiffs.

Lord and Merwin, contra.

[*189] M'LEAN, J., delivered the opinion of the court.

This case is brought before us by a writ of error to the circuit court of the United States for the district of Massachusetts.

The plaintiffs are merchants in Boston, and deal largely in wool, and, prior to the 4th of April, 1851, sold, occasionally, to [*190] *two corporations in the State of Connecticut, called the Thompsonville Company, and the Tariffville Company, and received therefor their notes, indorsed by Orrin Thompson. And, with the view of making further sales to them, having become doubtful of their pecuniary means and ability to make payment in future, the plaintiffs applied to Thomas B. Curtis, of Boston, the agent of defendant, to ascertain his opinion as to any possibility of loss, by selling largely on credit to said corporations or to Thompson; the plaintiffs knowing that the defendant was friendly to the companies, and intimately acquainted with their pecuniary condition.

A letter was written to defendant, by his agent, Curtis; and an answer was received, as alleged in the declaration of the plaintiffs, which induced them to give large credits to the two companies and Orrin Thompson, when, at the time, they were insolvent, which fact was known to the defendant.

The points in the case are stated in the bill of exceptions, and arise on the construction of the above letter and one of a subsequent date, and on facts proved and offered to be proved, which conduced to show, as plaintiffs insist, the fraudulent intent with which the letters were written.

The first letter, from Curtis to Brown, bears date the 5th of April, 1851, and reads as follows: "Dear Sir — I have your note of yester-

¹ Mr. JUSTICE CATRON did not sit in this cause.

day, but have scarcely had a moment to peruse it this morning. My object, at the moment, is to ask your opinion as to any possibility of loss, by selling largely to the Thompsonville Company or Orrin Thompson. Whatever that opinion may be, it will be discreetly used by myself."

The reply to this letter is marked "confidential," and dated "New York, 7th April, 1851. T. B. Curtis, Esquire. Dear Sir: With respect to Thompson and Co. and Orrin Thompson, I have to say, that our house done business with them for some twenty years or more; they have always met their engagements promptly, and we feel are men of strict integrity. They have unquestionably laid out too much money in the Tariffville Manufacturing Company, and the Thompsonville Carpet Manufacturing Company, and my house has been for years in the habit of loaning them either paper or money to a considerable extent on security. On the failure of Austen and Spicer, they were unfortunately on their paper (received for sales of carpets) for \$183,000; this threw, suddenly, so heavy a burden on Thompson and Co., that Messrs. Hicks and Co. and ourselves looked into their affairs, and feeling that they had an abundance to pay every one, and have a handsome sum left, if they continued their business, we jointly advanced the money to pay their indorsements as they came round, for which advances we have security.

* In order, however, to relieve them from the necessity of [* 191] borrowing, and needing more cash capital to carry on the business comfortably, both the companies alluded to owing Messrs. Thompson and Co. each about \$375,000, making, together, \$750,000, executed a mortgage to John H. Hicks, W. S. Wetmore, and James Brown, for \$750,000, to secure the payment of those bonds, which are payable in six, eight, and ten years. A gentleman goes out to Europe this month to negotiate these bonds, which he feels confident of doing on favorable terms. The negotiation of these bonds, and the securities held, would pay off all the advances made by ourselves, Messrs. Hicks and Co., and of W. S. Wetmore, who also made them some advances. From Thompson's statement of the business of the factory, they are doing a good, nay, a very profitable business, and I feel that in making sales to them now, no more than the ordinary business risk would be run.

"If the bonds are negotiated, which is confidently expected, they would be enabled to conduct their business with more facility and comfort than they have ever yet done, and as I will recommend brother William to take from sixty to one hundred thousand dollars for himself and for me, whatever they are negotiated at, the confidence shown will probably help the negotiation. Messrs. Hicks will

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also take some of them. Since the failure, Thompson and Co. have laid their hands on Austen and Spicer's property, to the extent of fifty thousand dollars, reducing the risk to one hundred and twenty-three thousand, and out of this they will get a dividend. As Mr. Orrin Thompson considers himself fully worth four hundred thousand dollars, any loss that can now occur by Austen and Spicer does not hurt him much. All they want is the negotiation of the bonds, to make them move on with perfect comfort. (Signed.) JAMES BROWN."

The next letter from Curtis to Brown is dated "Boston, 26th June, 1851. A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Company. I replied that I believed you thought favorably of the concern. Now I wish to know what your present feelings are in respect to that concern; there being several among my friends here who have heretofore sold them wool, and wish to continue to do so."

The answer to this letter was: "Dear Sir — We are in receipt of yours 26th instant; contents noted. We continue to have a favorable opinion of the concern you allude to. (Signed.) BROWN, BROTHERS, and Co."

Mr. Curtis being called as a witness, said he was agent for Brown, Brothers, and Co., who carried on, in the city of New York, [*192] *an extensive banking business. He wrote his first letter at the request of Iasigi, and never showed the reply except to him and his friend Mr. Skinner, until after the failure of the Thompsons. When he wrote to Brown, he did not let him know that the information requested was for any other person than himself. On the day his first letter was written, Iasigi said to him that he held a large amount of notes of certain factories in Connecticut, indorsed by Orrin Thompson, of New York; that by the recent failure of Austen and Spicer they had lost money, and he was solicitous about the paper he held. Witness supposed it amounted to about the sum of \$40,000. He said Brown was the friend of Thompson, and witness was requested to ascertain his standing by writing to Brown.

As the answer was marked confidential, the witness, when Iasigi first read the letter, declined handing it to him to show to his partner, but on his calling, it was shown to him also. Witness expressed a favorable opinion as to Iasigi's getting his money. Mr. Brown never authorized the witness to show his letter to any one. After the failure of Thompson, Iasigi stated he had collected his debt, but that he again trusted them. The witness remarked, that on that letter you should not have trusted them. He asked to see the letter, and on

reading it he said, if you had not stated this to be the same letter, I should not have believed it.

The witness stated, some of our clients prior to this had been in the habit of selling wool to Thompson and Co. There were five or six firms, importers of wool, who had credits with me. It was highly important to me and my principals that I should know the standing of this great concern, because large amounts of credits were being invested in wool, by houses which might or might not be jeopardized by selling to that concern; I mean invested by correspondents of Brown, Brothers, and Co., who had credits for them.

Mr. Grant, a witness, stated that he, Iasigi, and several others who had sold wool to the two companies and Thompson, had an interview with the defendant at his office in the city of New York, where a conversation respecting the letters was had, principally between Iasigi and Brown, who replied that the letter of the 7th of April was a guarded one, and as to the second letter, it was only a statement that "we continue to have a favorable opinion of the concern." He proceeded to say that the connection of Brown, Brothers, and Co. with Mr. Thompson had been of long date; that they had a great number of transactions together, and that at the time the April letter was written, they intended to carry Mr. Thompson through; but that Thompson had deceived them. He repeated several times that "this was a guarded letter, and as it was written [*193] in entire good faith, and as they had lost much more than we had subsequently to the writing of the letter, they did not see how there could be any responsibility resting on them.

As the company was about separating, Mr. Stewart Brown observed: "If you had called on us, gentlemen, and conversed with us instead of writing, you would not have sold this wool. That the letter was a guarded one, was several times repeated. That they had great confidence in Thompson; that at the time the letter was written they had lost their confidence, but still meant to carry him through in good faith; but being unable to do so, and having lost their confidence, the letter was guarded." On being asked by witness, if, at the time the first letter was written, he had all the property of Orrin Thompson conveyed to him, he replied: "No, sir, not all his property, but his real estate." There was no objection at this time by any one, that the letter was confidential. The Browns refused to acknowledge any responsibility.

After this evidence had been given, the plaintiffs offered evidence, not objected to or excluded, except as hereinafter stated, tending to prove that certain statements in the letter of April 7, 1851, material to show the property and credit of the two companies, and of Orrin

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Thompson, and the safety and expediency of selling them goods on credit, and material to influence and determine the judgment of one who should read the letter, in regard to the safety and expediency of so selling goods on credit, were false at the time the letter was written, and were then known to the defendant to be false. And that the defendant, prior to the 7th of April, alone and jointly with one Hicks, had taken conveyances, in mortgage or absolutely, of all Orrin Thompson's property, real and personal, with some small exceptions, to the amount of one hundred and eighty-eight thousand dollars, as security for the debt and liabilities of the house of Thompson and Co. to defendant's house and said Hicks, amounting to over five hundred and nine thousand dollars. And also offered evidence to prove that defendant had an interest of a pecuniary kind to sustain the credit of said Thompsonville Company, said Tariffville Manufacturing Company, and Orrin Thompson, and to induce extensive sales of goods on credit to them.

And other evidence was offered conducing to show that the letter was written with a fraudulent intent, and that it was intended for other persons than Curtis. And the plaintiffs proved that they made the sales stated in the declaration, relying on and trusting to the statements in said letter.

But the evidence, as above offered, was rejected as immaterial and as insufficient, when taken in connection with the other [*194] *evidence above set forth, to authorize the jury to find a verdict for the plaintiffs.

And the court thereupon ruled and held that the plaintiffs had not maintained their action, and directed a verdict for the defendant. And a verdict was accordingly so rendered. To which rulings and direction the counsel for the plaintiffs excepted.

The 3d section of the act of Massachusetts, to prevent frauds and perjuries in contracts and actions founded thereon, published in the revised statutes of 1836, provides that "no action shall be brought to charge any person, upon or by reason of any representation or assurance, made concerning the character, conduct, credit, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

As the letter was written in New York, a doubt has been suggested whether this statute can apply to the case. The letter was intended to operate in Massachusetts, and consequently the law of that State applies to it. But it is not perceived that the statute can have any other effect than to require the representation, on which the defendant is charged, to be in writing.

No one controverts the power and duty of the court to construe all written agreements or papers which are given in evidence. This is not the question involved in this case. No individual can be held responsible for a statement of facts, however injurious they may be to an individual or company. But when there is a misstatement of facts in regard to the pecuniary ability of an individual or company, and, especially, if this be done through interested motives or a fraudulent intent, by reason of which a credit is given and the debt is lost, the facts which conduce to establish the liability must, as in this case, be outside of the writing. And if these facts may not be established by parol evidence, there can be no remedy in such cases, however gross the fraud or ruinous the consequences may be.

It is contended that the letter of the 7th of April, being marked confidential, could have been intended only for Curtis, the agent, and that he was not authorized to show it to the plaintiffs. In his testimony, Mr. Curtis says, Brown never authorized him to show the letter. There may have been no express authority to show the letter, but the intention of the writer, in this respect, can be best ascertained by reference to the facts and circumstances under which it was written.

In his letter of April the 5th, Mr. Curtis requested to know "the opinion of the defendant as to any possibility of loss by selling largely to the Thompsonville Company or Orrin Thompson; * and he remarks, whatever that opinion may be, it [* 195] will be discreetly used by myself."

Mr. Curtis states, when under examination as a witness, that he was then, and had been for several years, acting as the agent of the Browns, and that was his principal business. He said that he was not, at any time, a seller of wool to the factories of Orrin Thompson. This employment of the agent must have been known to his principal, and it appears in the proof that when the plaintiffs and others had an interview with the defendant, in New York, he spoke of the letter being guarded, but made no objection that it had been written to his agent in confidence, and ought not to have been shown to the plaintiffs.

In view of these and other facts, it might have been submitted to the jury whether the defendant, in marking his letter "confidential," intended it for the eye of his agent only. The terms of the letter, independently of the above facts, would scarcely authorize such an inference. The "opinion will be discreetly used by myself." This was notice to Brown that the opinion was to be used, and how could it be used by the agent, who made no sales of wool to Thompson on his own account, without imparting the opinion to others; but "the

opinion will be discreetly used by myself." It shall not be made known by any other person than myself, and you may rely on my discretion. In view of the facts, the jury should consider whether the word "confidential" might be construed to mean, in confidence that you will use my opinion discreetly by yourself, as you propose, or whether it restricted the letter to the agent only.

This seems to have been the construction given to the letter by the agent. He suffered Iasigi to read it, but refused to give it into his hands to show to Skinner. Had the writer intended that no one should read the letter but Curtis, he would probably have said so. Such a restriction was not necessarily imposed by the terms of the letter, in view of the facts proved. Its detailed statement of facts in regard to the embarrassments of the two concerns and of Orrin Thompson, and how they had been relieved by himself and others, and enabled to do a good, nay "a profitable business," &c., would be a matter, in connection with other facts, for the jury to consider, and to determine whether the letter could have been written for the eye of the agent only, who at no time sold wool to Orrin Thompson.

In another letter written to the defendant by Curtis, he says: "A friend of ours desires me to inform him how far it would be satisfactory to me, (you,) to have him sell to the Thompsonville Company. I replied that I believed you thought favorably of the concern. Now,

I wish to know what your present feelings are in respect to [* 196] that concern, there being several among * my friends who have heretofore sold them wool, and wish to continue to do so." To this, Brown, Brothers, and Co. reply: "We continue to have a favorable opinion of the concern you allude to."

This letter sheds some light on the first letter of Brown. It was on the same subject, and was a reiteration of what had been stated more particularly and at large in the first letter. In fact, the words "we continue to have a favorable opinion of the concern you allude to," refers to an opinion before expressed.

As the court instructed the jury to find for the defendant, on the ground that the plaintiffs had not sustained their action, if the plaintiffs gave, or offered to give, any evidence which was fit to be considered by the jury, the judgment must be reversed. Any evidence conducing to prove that the statements of the defendant, in the letter of the 7th April, in regard to the condition of the Thompsonville Company and Orrin Thompson, and their ability to meet their engagements, and in regard to the value of Thompson's property, were false, was competent evidence as tending to prove the facts. And especially was the testimony of Grant admissible, who heard the defendant say, if the plaintiffs had called on them personally,

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they would not have sold their wool to the company; also the statement that before the letter was written, Brown admitted that he had lost confidence in Thompson, and therefore the letter of the 7th of April was guarded. These, and all other facts which conduce to show that the defendant acted in bad faith in writing that letter, are proper to be considered by the jury.

By whatever motives the defendant may have been actuated, he is not to be held responsible, unless his letters did mislead, and were intended to mislead the plaintiffs. And it will be for the jury to say, on a thorough examination of the letters, and the facts and circumstances connected with them, whether they were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the Thompsonville Company and Orrin Thompson. If an impression, not only of their solvency but of their success in business, so that by selling largely to them no more than the ordinary risks of business were incurred, was made and authorized, by the letters, while, at the same time, their true condition was known to the defendant, which did not authorize such a representation, and which was intended to deceive and mislead the plaintiffs, the defendant may be justly held responsible. But of this the jury are to judge, they being the triers of the facts outside of the letters, and which should be submitted to them for their consideration and decision.

We have necessarily referred to the leading facts stated in the bill of exceptions, in order to show that the circuit court erred in *withdrawing them from the jury; but we express no [* 197] opinion on the merits of the case.

The judgment of the circuit court is reversed, and the cause is remanded for a *venire de novo*.

Nelson, J., Curtis, J., and Campbell, J., dissented.

CURTIS, J. I do not agree with the majority of my brethren in this case. But, as I may be required to preside at the trial which has now been ordered, I am not willing to enter into a discussion of the evidence heretofore given, and which will doubtless be repeated on another trial. Without doing so, it is not practicable to exhibit the legal principles which, in my opinion, should govern this case. I therefore merely say I do not concur in the judgment.

CAMPBELL, J., dissenting.

The importance of this cause renders it proper that the reasons for a dissent from the judgment should be placed on the record. The charge of the plaintiffs, is, that in anticipation of large sales of

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merchandise to two manufacturing corporations of Connecticut, on a credit, and distrustful of their condition to govern and direct their conduct, they sought of the defendant, through his agent, an opinion and information of them and their indorser, Orrin Thompson, as to the risk they would encounter. That the defendant was intimate with their affairs, and knew they were untrustworthy; but well knowing the motives of the plaintiffs' inquiry, they wrote to their agent a letter, for exhibition, containing false and fraudulent statements and representations, calculated and designed to increase the credit of the corporations and Thompson, and to induce the plaintiffs and others, who like them, should see the letter, to sell their property to them. These averments, describing the circumstances under which the information was obtained, and the knowledge of the defendant of the aims of the plaintiffs, are, in my opinion, material, and should be substantially proved.

In *Pasley v. Freeman*, 3 T. R. 51, Justice Ashhurst, replying to the argument that, should the principle of that suit be supported, actions might be brought against any one for telling a lie by the crediting of which another sustains damage, said "No; for, in order to make it actionable, it must be accompanied with the circumstances averred

in the count, namely, that the defendant, intending to [* 198] deceive and defraud * the plaintiff, did deceitfully encourage

and persuade them to do the act and for the purpose made the false affirmation, in consequence of which they did the act."

And Lord Kenyon said two grounds of the action concur: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage."

The case of *Pilmore v. Hood*, 5 Bing. N. C. 97, was that of a defendant about to sell a public house to one who had agreed to purchase. He fraudulently misrepresented to him its receipts. The bargain having failed, the sale was made to another, who had heard these representations and acted upon them with the knowledge of the defendant. Lord Chief Justice Tyndal said that notice to the defendant was "an important ingredient in the case," and adapting the terms of *Langridge v. Levy*, 2 M. & W. 532, he says: "We do not decide whether the action would have been maintainable if the plaintiff had not known of and acted upon the false representation. Nor whether the defendant would have been responsible to a person not within the defendants' contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide

that he is responsible in this case for the consequences of his fraud, whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."

In *Gerhard v. Bates*, 2 Ell. & Black. 476, the misrepresentation was contained in the prospectus of a bubble company, of which the defendant was a director. Lord Campbell said, "that had the plaintiff only averred that afterwards, having seen the prospectus, the plaintiff was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant, and the act of the plaintiff, from which the loss arose; but the second count goes on expressly to charge the defendant, that by means of the said false, fraudulent, and deceitful pretences and representations, he wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer, and plaintiff did then and by reason thereof actually become the purchaser and holder of the shares, and alleges the loss sustained to have been the direct consequence of the defendant's act. Thus the wrong and the loss are clearly concatenated as cause and effect."

The allegations, therefore, being essential to the action, the *question is, was there any evidence to go to the jury [*199] for their support?

I leave out of consideration, for the present, the statute law of Massachusetts. The charge of the declaration is that the letter was written for exhibition to the plaintiffs, and among dealers like the plaintiffs, and to deceive those who should see it. The proof of the plaintiffs is that until after the failure of the corporations, only two persons were permitted to see it, or heard of its contents from Mr. Curtis. One of these was Skinner. The proof in regard to the exhibition to him is: "Iasigi asked me (Curtis) to let him take the letter to his friend Skinner, with whom he always advised. I (Curtis) again said the letter was confidential, and that I could not suffer it to go from my office. He then said, will you let Skinner see it here, repeating that he always advised with Skinner on matters of importance, and that he wanted him to see it. Upon this solicitation I consented, and Skinner came with Iasigi, and read the letter."

There is no evidence that Skinner ever had a transaction with the corporations of Connecticut, or conducted a business which could bring them into any contact or connection. And surely this evidence can afford no support to the averment of a purpose to defraud or injure him or others through him.

The charge in the declaration, by this evidence, loses its generality, and is reduced to the imputation of a mischievous and fraudulent

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design upon the plaintiffs alone. The only use, "the discreet use," of the opinion contained in the defendant's letter, consisted in communicating its contents to Iasigi himself, and to his confidential friend, at his solicitation, and that he might advise intelligently with him. It then becomes necessary to inquire of the circumstances under which that communication was made to him. It was not told to the defendant that the plaintiffs had asked for information of Mr. Curtis, nor that his letter was written at his request, nor was he advised until several months afterwards that any use had been made of the letter. I do not think it necessary to consider how much the power of the agent was limited by the mark "confidential," on the face of the letter, but I will suppose that it was nothing more than a repetition of the caution that it should be "discreetly used" by Mr. Curtis, and that the defendant is liable for the use he made.

The evidence on the record comes from the plaintiffs; and in reference to the circumstances of the exhibition, from a single witness. The agent of the defendant was the near neighbor and friend of the plaintiffs, but had never had any intercourse of business with them, either for himself or for his principal.

Such being their relations, Iasigi, on the 5th April, came [* 200] * to him as a friend and neighbor, and stated, that "he had a large amount of notes of certain factories in Connecticut, indorsed by Orrin Thompson; that there had been a failure recently, in New York, (Austen and Spicer,) by which he thought the factories, or Orrin Thompson, or all of them, would lose money; and that he felt anxious as to the fate of the paper he held. He did not state the amount he held exactly, but Curtis was led to believe it was about \$40,000. He proceeded to say that Mr. James Brown was a friend of Orrin Thompson, and that he, Iasigi, had himself heavy dealings with him, and that he wished him (Curtis) to write to Mr. James Brown, and ask him about the standing of Thompson and his property. Curtis accordingly wrote, but did not state that he wrote at Iasigi's request." Upon this statement, the particular form of the inquiry is open to, and will be the subject of remark hereafter. The question to Mr. Brown is: "What is your opinion as to any possibility of loss to the Thompsonville Company or Orrin Thompson?" The witness proceeds: "I was led to ask the information and to communicate the result to him in consequence of the friendly relations that had long existed between us, and further, because I thought it would tend to relieve Mr. Iasigi's mind, and not with a view to future sales." He says further: "At these interviews about my letter, and Brown's reply, there was nothing said about any anticipated or prospective operations by Iasigi. Mr. Iasigi said the credits were due to

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him." The witness "never knew that he had sold his notes," but was asked if he would guarantee them.

This statement of the circumstances of the exhibition of the letter to Iasigi contains the whole case. No other letter of the defendant was seen by him, no other communication was made to him, nor was this letter after this produced to any other person before the failure of the corporations. Now the proof of the plaintiffs is, that they held but a single note, of less than \$800, running on time, at this date: the others had been sold in the winter previously, in the New York market, without indorsement or guarantee. They had a book debt then due upon which a large payment was made within ten days after, all of which has been collected, and about which no solicitude was expressed. It likewise appears that Iasigi did contemplate further operations, for in January, Thompson had taken samples of wool to arrive, and which did arrive, and was sold about six weeks from this interview.

Before closing this statement of the evidence, it is proper to note the impression that the defendant's letter made upon those who read it, as an accrediting document.

Curtis reading it with the object of deciding whether the *corporations and Thompson would meet their negotiable [*201] notes for two or three months, was willing to guarantee the debt for the usual commission; but when told that credits on sales were given afterwards, he "expressed his surprise that Iasigi should have sold after reading that letter." Skinner, who probably knew the secret purpose of Iasigi, and interpreted the letter accordingly, was not "favorably impressed." Iasigi, in reply to the expression of surprise by Curtis, quoted above, asked to see the letter again, and after reading it said: "If you did not say that this was the same letter I read in your office, I should say that I had never seen this letter before;" and the Browns, when interrogated upon it after the failure of these parties, said that the letter was a guarded one, and did not warrant credits on sales to them. Having collected the facts important to the issue, the question arises, do they constitute a case to go to the jury upon this declaration? The evidence is that the plaintiffs anticipating consignments of wool, and sales to these Connecticut corporations, and desiring the defendant's information and opinion of them, through Iasigi, approached his neighbor and friend, Mr. Curtis, the confidential agent of the defendant, to engage him to procure this opinion and information from his principal in New York. He approaches Curtis with a statement of anxieties for debts, existing in the form of negotiable notes running on time.

These statements were certainly not accurate, and are, apparently,

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insincere; and it will be noticed that the motive alleged in the declaration, as prompting the plaintiffs, was not revealed, and if it existed, was disguised under the apprehensions that were then expressed. The evidence shows the plaintiffs did not have notes of the amount spoken of, and that the book debt was then due. There is a discordance between this evidence and the inquiry proposed in the letter of Curtis. That inquiry discloses no apprehensions of loss upon existing debts, but refers to perils to arise on future transactions. If Iasigi suggested the form of the inquiry with a view to obtain information to guide his conduct, as the declaration avers, and concealed his aim, and by affecting an alarm he did not feel, covered that aim from Curtis, it has the appearance of circumvention. Curtis says he wrote his letter in consequence of his friendship for the plaintiffs, to calm their fears, and without an intimation of prospective operations. Curtis gave a pledge that he would use the letter of the defendant discreetly. Before the letter was placed in the hands of the plaintiffs, they were informed it was "confidential," and Iasigi read that upon the letter itself. Iasigi again confirms the impression

of Curtis, that apprehensions of loss upon his notes were [* 202] still moving him, by addressing queries as to the * probabilities of his getting his money, and importunes Curtis to exhibit the letter to his friend, that he might profit from his counsel. The declaration avers that this letter, exhibited under such circumstances, was written for exhibition to inquiring dealers, to encourage and persuade them to give credit to these corporations, and was shown to the plaintiffs with that design. That when it was written and exhibited, the anticipated transactions from which loss has followed, were known to the defendant, and the object of the exhibition was to induce the plaintiffs to make them.

I find no support for these averments, but a direct and palpable contradiction of them. This conclusion upon the evidence renders a discussion of the statute of Massachusetts, (Rev. Stats. c. 74, § 3,) requiring that representations of the character, ability, and conduct of another person should be in writing to support an action, unnecessary. But the discussions upon a similar statute fortify the conclusions contained in this opinion. "The true construction of the statute," says Lord Abinger, "is, that the representation or assurance should concern or relate to the ability of the other person effectually to perform and satisfy the engagement, of a pecuniary nature, into which he has proposed to enter, and upon the faith of which he is to obtain money, credit, or goods." 1 M. & W. 101, 123. "He who has money to lend or goods to sell on credit, and doubts the ability of the borrower, or buyer," says Baron Gurney, "may exact his

own terms; he may insist on having a representation or assurance in writing of the ability, from a third person; and if that be refused, he may keep his money and goods. If he thinks fit to trust without that, he has no right to resort to the responsibility of the person of whom he inquires." S. C. 107. Baron Alderson says: "If we refer to the cases which had occurred before the legislative provision, I think it will be found that the decision in the class of cases commencing with *Pasley v. Freeman*, had raised a well-founded complaint in the profession of having virtually repealed the statute of frauds, by which a guarantee was required to be in writing, and that the object Lord Tenterden had in view, was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle. He adds, "that fraud, in substance, amounts to an implied guarantee of the plaintiff's solvency."

Had Curtis given a guarantee to the plaintiffs of their debt, either for or without a commission, and accompanied the act with statements of the pecuniary condition of the debtors, and expressions of confidence in his solvency wholly unwarranted, it is clear that it would have imposed no responsibility for sales not then *spoken of or alluded to, which were not made for several [* 203] weeks afterwards, which were not contemplated by one of the parties, and if by the other, were concealed in all the intercourse that then took place. The statute was designed to reduce the liabilities, for the representations it describes, to some definite and appreciable limit; that the representations should be evinced in a written document, and that those who were to derive a benefit from it as a security, should be ascertained from its contents; and that the liability on the document should not be extended beyond the engagements to which it had reference.

The questions embraced in this case, are exhibited in a short conversation detailed in the evidence of the plaintiffs. Curtis says: "After the failure of the corporations, in September, I had an interview with Mr. Iasigi. I met him in the street; he accosted me in a state of excitement; he said: 'Mr. Curtis, Thompson has failed, and the Thompsonville Company has failed.' I said: 'I am sorry, but you have got your money.' He said: 'Yes, I have got the money that was owing to me, but I have trusted them again.' I expressed surprise that he should have trusted them again."

It was not with a declared purpose of trusting them again that Iasigi sought information of Curtis; nor was the confidential letter of Mr. Brown to his agent read, with the avowal that future operations were to be affected by the impression it made; nor was the

questionable act of its exhibition superinduced by any suggestions of the existence of pending negotiations.

The objects disclosed by Iasigi were wholly incompatible with, and exclusive of, the notion of any legal responsibility for the accuracy or sufficiency of the letter, or even for a wilful misrepresentation.

He did not ask for information, proposing action, even in regard to the notes of which he spoke, nor did any alteration of his debt take place in consequence. He simply inquired of Curtis, that anxieties might be relieved and his apprehensions quieted.

The liabilities incurred in cases like that described in the declaration, are for a fraud productive of damage; of damage directly consequential and in the contemplation of the parties, as a result of the act done, and not for consequences remote, contingent, and arising from acts unconnected with the objects disclosed or comprehended by them.

21 H. 146.

THE UNITED STATES, Plaintiff, v. LINDSEY NICKERSON, JUNIOR.

17 H. 204.

The seventh section of the act of July 29, 1813, (3 Stats. at Large, 49,) requires an oath to the verity of the fishing agreement, as well as to the truth of the certificate of the times of sailing and returning.

An indictment for perjury need not refer to the act of congress which required the oath in question to be taken; it should aver the facts which constituted the occasion for taking the oath, and the court will take notice of any act of congress which required it.

THE case is stated in the opinion of the court.

Cushing, (attorney-general,) in support of the demurrer.

Lothrop, contra.

[*208] * CURTIS, J., delivered the opinion of the court.

This case comes before us upon a certificate of division of the opinion by the judges of the circuit court of the United States for the district of Massachusetts.

At the March term, 1854, of the district court of the United States for the district of Massachusetts, Nickerson was indicted for the crime of perjury. The indictment charged, that in order to obtain the allowance of bounty money, on account of the employment of a vessel in the cod fishery, of which vessel he was the agent, he made oath before the collector of the district of Barnstable, where the vessel was enrolled and licensed, that a certain paper, produced by him to the collector, was the original agreement made with the fishermen

employed on board the vessel during the fishing season then last past; that three fourths of the crew so employed were citizens of the United States, or not subjects of any foreign prince or state; and that these statements were false, and known to the defendant to be so when he made the oath.

Upon this indictment, Nickerson was tried and acquitted.

At the May term, 1854, of the circuit court for the district of Massachusetts, Nickerson was again indicted, and to this last indictment, pleaded specially his former acquittal, and the plea was demurred to.

The question raised by this demurrer, and upon which the opinions of the judges were opposed, is, whether the same evidence, which is competent and essential to support the indictment in the circuit court, might have been admitted in support of the former indictment in the district court.

The demurrer admits that the defendant is the same person charged by the former indictment, and that the oath alleged in the former indictment to have been taken, is the same oath alleged in this indictment. It appears from a comparison of the two indictments that the same occasion of taking the oath is alleged in both; that occasion being to obtain an allowance of money from the United States, as bounty, on account of the *employment of a [* 209] vessel called The Silver Spring, in the cod fishery, during the season then last past.

Each indictment contains, substantially, the same allegation respecting the authority of the collector to administer the oath; that allegation being that the collector had competent power and authority to administer the same. Under the 19th section of the crimes act of April 30, 1790, 1 Stats. at Large, 116, this averment would let in any legal evidence of the lawful power of the collector to administer the oath.

The false swearing alleged in each indictment is the same, and the only question is, whether the indictment in the district court was so drawn as to preclude the United States from offering evidence to prove that the defendant knowingly and wilfully swore falsely that the paper produced was the original agreement, and that three fourths of the crew were citizens.

The argument is, that the former indictment, by its terms, limited the government to proof of false swearing in an oath required to be taken by the act of July 29, 1813, 3 Stats. at Large, 49; that this act does not require either the verity of the agreement with the crew, or the citizenship of three fourths of the crew, to be sworn to; and consequently, that neither of the perjuries charged could be proved under the former indictment.

The 7th section of the act of 1813 is as follows: "That the owner or owners of every fishing vessel of twenty tons and upwards, his or their agent or lawful representative, shall, previous to receiving the allowance made by this act, produce to the collector, who is authorized to pay the same, the original agreement or agreements which may have been made with the fishermen employed on board such vessel, as is hereinbefore required, and also a certificate to be by him or them subscribed, thereon mentioning the particular days on which such vessel sailed and returned on the several voyages or fares she may have made in the preceding fishing season, to the truth of which he or they shall swear or affirm before the collector aforesaid."

It is argued that this requires an oath to the truth of the certificate only, and not to the verity of the agreement.

This depends upon the meaning of the relative pronoun "which." Does it refer to and include both papers to be produced to the collector, or only one of them? It may refer only to the one last mentioned, or to both. Grammatically it is capable of either construction.

Considering the nature of the act, the objects which congress had in view, and the mischiefs to be guarded against, we are of opinion that it was intended to require on oath to the verity of both papers.

This section of the law is not penal; it is directory merely. [*210] * It requires certain acts to be done in order to obtain an allowance of public money. The nature of the act, therefore, does not require a strict interpretation, rigidly confined to what is so clearly expressed as to admit of no doubt. It calls for such an interpretation as will guard the public treasury from fraud, so far as the language employed by congress, when fairly construed, is capable of doing so.

The inducement to the payment of these bounties was, the public policy of training a body of native seamen, by an industrious pursuit of the cod fishery during a fixed portion of the year. To accomplish this, it was deemed important that the seamen should participate directly in the profits of the voyage, in the manner pointed out by the act of June 19, 1813, 3 Stats. at Large, 2. And accordingly, the 8th section of the act in question provides that no vessel shall be entitled to bounty, unless an agreement should be made with the fishermen in conformity with that act. The production of the agreement was therefore the production of a paper, as essential to the claim as the certificate of the times of the departure and return of the vessel; and the verity of the agreement is as essential to the justice and legality of the claim, and to the accomplishment of the ends designed by congress, as the verity of the certificate. It is apparent, also, that

the former, as well as the latter, may be false, and that the collector has no better means of knowledge of the truth or falsehood of the paper purporting to be the agreement, than he has of the truth or falsehood of the certificate. The mischiefs to be guarded against were therefore the same.

The case, therefore, is one where the law requires two documents to be produced to a public officer, to constitute a title to an allowance of public money. The verity of both is essential to the justice and legality of the claim. The officer has no means of testing the verity of either, except what is given by this law. Congress has considered it proper that an oath should be taken by the applicant. The question is, whether this security of an oath was intended to be confined to one of the documents. The language employed is capable of such a construction, but it is also capable of meaning that the security of an oath was to extend to both. In our judgment, the latter is to be deemed to have been intended by congress; and we therefore hold that so much of the first indictment as charged that an oath as to the agreement was required by the act of 1813, was correct in point of law. But this does not dispose of the whole question; because there can be no pretence that the act of 1813 required an oath to the fact that three fourths of the crew were citizens. In point of fact, there was no requirement on the
* subject of the citizenship of the crew when the act of 1813 [* 211] was passed, nor until the act of March 1, 1817, 3 Stats. at Large, 351; and the argument on the part of the United States is, that as the former indictment was limited to an oath required to be taken by the act of 1813, the defendant could not be tried thereon for false swearing as to the citizenship of the crew. But we are of opinion that the former indictment was not thus limited. The particular allegation supposed to have that effect, is as follows:—

“ Which said oath so taken by the said Nickerson, jr., was required to be taken by the owner or agent of said fishing vessel, under and by virtue of an act of congress of the United States of America, approved July 29, 1813, and reënacted February 9, 1816,¹ and in a matter and proceeding then and there required by law, in order to obtain the allowance aforesaid for said fishing vessel, it being then and there material and required by the act aforesaid, and by force of the statutes of the said United States therein provided, in order to obtain said allowance of money, that the owner of said fishing vessel, or his agent or representative, previous to receiving such allowance, should swear as aforesaid to the truth of the aforesaid declarations.”

¹ 3 Stats. at Large, 254.

The pleader here not only refers to the act of 1813, but also avers that the oath was taken, "and in a matter and proceeding then and there required by law, in order to obtain the allowance aforesaid for said fishing vessel." It is true, the whole allegation, if it is correctly copied in the record, is somewhat confused, but, according to any construction which we have been able to put upon it, it does not confine the requirement of the oath to the act of 1813 only.

It was not necessary to aver in the indictment what act or acts of congress required the oath to be taken. The averment that it was taken by the owner or agent to obtain an allowance of bounty, and the description of the oath which was taken, and of its occasion, were the only matters of fact necessary to be alleged to show the materiality of the oath, and that it was an oath required by law. The court was bound to take judicial notice of the requirements of all acts of congress respecting it. It was competent for the government, under these averments of facts, to rely on any act of congress which required the oath to be taken, without referring to it.

This was not a question respecting the authority of the collector to administer the oath. That, as has already been observed, was correctly averred in both indictments, pursuant to the act of 1790. And under that general averment of competent authority, any laws and any fact constituting that authority might have been [* 212] shown. The question here was, whether such *an oath as is described in the indictment, being taken before a collector who had competent authority to administer it, for the purpose of obtaining an allowance of bounty money, was an oath which, if wilfully false, would subject the defendant to be punished as for perjury. And we do not think this question was so narrowed, by the passage above extracted from the former indictment, that evidence of an oath required or authorized by any other act besides that of 1813 could not be given under that indictment; and we order it to be certified accordingly.

Order. This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and on the point or question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of congress in such case made and provided, and was argued by counsel. On consideration whereof it is the opinion of this court that the special plea pleaded by the defendant is a good plea in bar to the indictment; whereupon, it is now here ordered and adjudged by this court that it be so certified to the said circuit court.

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JOHN HENSHAW, Plaintiff, v. JOHN R. MILLER, Executor of CHARLES E. MILLER, deceased.

17 H. 212.

Under the laws of Virginia, an action on the case for a false representation as to the credit of another, does not survive against the defendant's executor.

THE case is stated in the opinion of the court.

Heath, for the plaintiff.

Lyons, and *Stannard*, contra.

*DANIEL, J., delivered the opinion of the court. [* 217]

This case is brought before this court upon a certificate of division in opinion between the judges of the circuit court of the United States for the eastern district of Virginia.

The facts of this case, and the question of law arising thereon, upon which the judges were divided, are shown in the following statement: —

John Henshaw, the plaintiff in the circuit court, instituted in that court an action on the case against Charles E. Miller, to recover of him damages for fraudulently recommending to the plaintiff, by letter, one Porter Robinson as a person worthy of confidence, and thereby inducing the plaintiff to make sale on credit to the said Robinson of a considerable amount of merchandise, when the defendant knew that Robinson was unworthy of credit, and intended fraudulently to deceive the plaintiff, *who in fact, had been de- [* 218] ceived by the recommendation given by the defendant to Robinson, and upon the faith thereof had made sales to him, the whole amount whereof had been lost. In this case, after issue joined upon the plea of not guilty, and after several attempts at a trial of the cause, rendered fruitless by disagreement amongst the jury, the defendant departed this life, and on the motion of the plaintiff, a writ of *scire facias* was awarded him to revive the suit against John R. Miller, the executor of the original defendant.

Upon the return of the *scire facias* executed, the executor moved the court to quash the process. This motion was continued until the May term of the court, 1853, when, upon the argument of the motion to quash the *scire facias*, the question occurred whether the action survived against the executor of the original defendant, or abated by the death of the latter; and opinions of the judges being opposed on this question, at the request of the counsel for the de-

fendant, it was ordered that the division be certified to the supreme court at its next session.

In considering the question presented by the certificate of division in the circuit court, we must adopt for our guidance the following principle, namely, that this question is to be determined by the rule of the common law with respect to the revival of suits, except so far as that rule has been modified, either by restriction or enlargement, by the statutory provisions of the Virginia laws.

To the principle just mentioned we are bound to adhere, for the following causes : —

By an ordinance of the Virginia convention, passed on the 3d of July, 1776, it was declared : “ That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of James I., and which are of a general nature and not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be in full force until the same shall be altered by the legislative power of this colony.”

At a subsequent period, namely, on the 27th of December, 1792, the legislature of Virginia, by an act of that date, after reciting the ordinance above mentioned, declared and enacted as follows, namely : “ § 2. That whereas the good people of this commonwealth may be ensnared by an ignorance of acts of parliament, which have never been published in any collection of the laws, and it hath been thought advisable by the general assembly during their present ses-
[*219] sion, specially to enact *such of the said statutes as to them appear worthy of adoption, and do not already make a part of the public code of the laws of Virginia.” “ § 3. Be it therefore enacted by the general assembly of Virginia, that so much of the above-recited ordinance as relates to any statute or act of parliament shall be and the same is hereby repealed ; and that no such statute or act of parliament shall have any force or authority within this commonwealth.” These provisions are followed by savings with respect to rights arising under any of the above-mentioned statutes, and as to any crimes committed against them before this repeal, and also of the benefit of all writs, remedial or judicial, which might have been legally obtained or sued out of any court, or the clerk’s office of any court, of the commonwealth, prior to the commencement of the statute.

These two enactments have been continued in force, and will be found to be reënacted in the revisal of 1819, vol. 1, chapters 38 and 40.

The statutes, therefore, of 4 Edw. III. c. 7, or of 3 & 4 Will. IV., or any other English statute as such, cannot govern this case, nor in anywise influence its decision, except so far as by parity the courts of Virginia may have applied the interpretation of those statutes by the English courts to similar provisions, if such there be, in the laws of Virginia.

The maxim of the common law is, *actio personalis moritur cum persona*, and as this maxim is recognized both in England and in Virginia, the interpretation of it in the former country becomes pertinent to its exposition or application here. In England, it has been expounded to exclude all torts when the action is in form *ex delicto*, for the recovery of damages, and the plea not guilty. That in case of injury to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives. 1 Saund. 217, n. 1; 2 M. & Sel. 408. And so express and strict have been the applications of this maxim of the common law by the English judges, as to have established the rule, that for the breach of a promise to marry, although the action is in form *ex contractu*, yet the cause of action being in its nature personal, the executor of the party to whom the promise was made cannot sue.

And again, that for the breach of the implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue without stating that the testator had sustained some actual damage. *Vide* 4 Moore, 532; 2 B. & B. 102, and 2 M. & Sel., before mentioned. This has been ruled even under the alleged relaxation of the common law maxim [*220] in virtue of the statutes of 4 Edw. III. cap. 7, and 3 & 4 Will. IV. cap. 42. By the English courts it has been also ruled, that although the statutes which have conferred upon executors the right to maintain actions in certain cases arising *ex delicto*, do not limit that right to instances of a literal asportation of the goods or assets, yet they confer the right of action upon the executor in instances solely of actual injury to personal property, whereby that property has been rendered less beneficial to the executor. 2 M. & Sel. 416.

Let us see how far the common-law maxim has been modified in Virginia, either by express statutory language or by judicial construction.

By the 38th section of chapter 128, vol. 1 of the Revised Code of 1819, it is provided: "That where any personal action or suit in equity is now or shall be depending in any court of this commonwealth, and either of the parties shall die before verdict rendered or

final decree be had, such action or suit shall not abate, if the same were originally maintainable by or against an executor or administrator, but the plaintiff; or if he be dead, his executor or administrator, or the sheriff, sergeant, or other curator of the decedent's estate, shall have a *scire facias* against the defendant; or if he be dead, against his executor, administrator, sheriff, sergeant, or other curator of his estate, to show cause generally, why such action or suit shall not be proceeded in to a final judgment or decree."

This section of the statute provides merely against the abatement of actions at law or of suits in equity by the death of parties, as a matter of course, but it gives no further description of actions or suits than by reference to such designation of them and their capacity for revival as may be deducible either from the common law or by some statutory regulation.

By the 64th section of chapter 104, vol. 1, 390, of the same code, it is declared: "That actions of trespass may be maintained by or against executors or administrators, for any goods taken or carried away in the lifetime of the testator or intestate, and that the damages recovered shall be in the one case for the benefit of the estate, and in the other out of the assets."

This provision of the Virginia statute, in so far as it authorizes an action against the personal representative as well as in his favor, is unquestionably an extension of the statute of Edward III. which confers the right of action upon the executor or administrator, but does not authorize an action against him. But, although the former statute is certainly an extension of the latter, with respect to the parties for or against whom the right of action is given, it has been doubted, and upon very high authority upon the point, [*221] whether with respect to the class of * subjects to which the right of action is authorized, the statute of Virginia does not operate a material restriction upon the provision of the English statute. The statute of Edward III. is thus entitled: "Executors shall have an action of trespass for a wrong done to the testator," and reciting "that in times past executors have not had actions for a trespass done to their testators, as of goods and chattels carried away in their life, and so such trespasses have hitherto remained unpunished." It is enacted, that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were in life."

In the interpretation of this statute, the courts in England have ruled, that the right conferred on the executor to maintain trespass for a wrong done to the testator, must, with reference to the language of the times when the statute was passed, signify any wrong; and

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that the instance put, namely: "as of the goods and chattels of the same testators carried away in their life," was put in the statute only as an instance or illustration, and by way of limiting the right to injuries to personal property, and not as restrictive to the single or particular form of injury; and that the statute must be construed to extend to every description of injury to personal property by which it has been rendered less beneficial to the executor, so that the executor may support trespass or trover, case for a false return to final process, and case or debt for an escape. *Ld. Raym.* 973.

The provision of the statute of Virginia by which the right of action by or against the personal representative as to torts is conferred, is introduced by no preamble or declaration by which any object or purpose beyond its literal terms may be implied. It is a simple section of the statute concerning wills, intestacy, and distribution, and clearly defines the single instance in which trespass may be maintained by the personal representative; the instance of "goods taken or carried away in the lifetime of the testator or intestate;" no other species of trespass or wrong is enumerated or alluded to. *Vide* 1 Rev. Co. of 1819, § 64, 390.

In reference to this section, and in comparing it with the statute 4 Edw. III, it has been remarked by Green, Justice, in the supreme court of Virginia, that in the construction of the latter statute, "it has been decided that the word trespass, as it was then understood, embraced all cases of tort; that the word wrong in the title is general, and that the words 'as of the goods,' &c., were inserted only by way of example, so as to confine the remedy to cases in which the wrong affected the goods and chattels. But our statute, without any such title or general words as are found in the title and in the enacting clause of * the English statute, gives the action of [* 222] trespass for goods taken and carried away, and provides for that case only substantively, and not by way of example. *Vide* Thweatt's Administrator v. Jones's Administrator, 1 Randolph, 331."

But this 64th section would seem to have received a more explicit and definitive interpretation by the decision of the supreme court of Virginia in the case of *Harris v. Crenshaw*, reported in the 3d of Randolph, 14. That was an action of trespass *quare clausum fregit*, in which there was a verdict and judgment in favor of the defendant who died, and whose representative was made a party by consent. The case was carried by appeal as is the practice in Virginia, at law as well as in equity, to the supreme court by the plaintiff, upon exceptions taken to instructions from the judge at *nisi prius*. In delivering the opinion of the court, Tucker, President, says: "This is nothing more than an ordinary action of trespass *quare clausum*

fregit. The allegation that the trees were cut and carried away, is always inserted in the declaration when it is intended to be proved. It did not convert the action into an action of trespass *de bonis asportatis*, and take it out of the rule *actio personalis, &c.* If the defendant had died before verdict, the writ would have abated, and the plaintiff would have been deprived of damages if he had sustained any. But there being a verdict and judgment against him, by which he may be hereafter affected in some other controversy respecting the premises, he has a right to reverse that judgment if he can, and was entitled to a *scire facias* against the personal representative of the appellee." Then, in commenting upon the exceptions to the instructions from the judge at *nisi prius*, the court proceeds thus: "The second instruction of the judge was therefore erroneous, and the judgment is to be reversed and the verdict set aside; and as by the death of the appellee the appeal abated here, and there can be no prosecution of the suit in the court below, it coming within the rule before stated, that is to say, the rule of the common law, *actio personalis, &c.*, it is to be abated here, and the proceedings certified to the court below."

By this decision of the supreme court of Virginia, the following positions must be taken as having been affirmed:—

1. That by the rule of the common law the right of action founded upon torts of any and every description, terminated with the life of either participant in such tort. That this maxim or rule of the common law governed all causes of action arising *ex delicto* in Virginia, except so far as it may have been modified by statute.

2. That the provision of the statute of Virginia, authorizing actions for or against executors and administrators, for torts [* 223] * done or suffered by those whom they represent, limits those actions to instances which are essentially or rather directly cases of trespass *de bonis asportatis*, and cannot be made to embrace ordinary cases of trespass *quare clausum fregit*, or cases of tort generally, by attempting to connect with them as an incident the asportation of goods and chattels; much less can it be made to cover an indirect or consequential injury to the welfare or prosperity of a testator or intestate resulting from a fraud practised upon him.

There is one case from the supreme court of Virginia, cited by plaintiff, and relied on to sustain the right of action in the executor. It is the case of *Lee v. Cooke's Executor*, reported in *Gilmer*, 331. This was an action for mesne profits of land which had been recovered in ejectment. After issue made up in the cause, the defendant died. At a subsequent term of the court, the executors appeared by attorney, and the cause was continued. At the term next ensuing,

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the cause was directed to be struck off the docket, the court thinking that the action abated by the death of the defendant.

This decision was reversed by the supreme court, the latter tribunal being of the opinion that the case was within the equity of the 64th section of the Virginia statute, cap. 104, 1 Rev. Co. 390, and that the action, so far at least as regarded the mesne profits, did not die with the testator. The case is very succinctly given in the report, and is accompanied with no argument showing explicitly the grounds on which it was contested. It may have been regarded by the supreme court as resting upon an implied obligation or assumption to pay or account for profits ascertained by the judgment in ejectment to belong to the plaintiff, and therefore, as partaking essentially of the character of a contract. Or, if in any sense the right of action could be understood as arising from the asportation by the defendant, it must be by such an acceptance of the phrase as will apply it to the mesne profits specifically, as being personal property belonging to the plaintiff, and actually injured by the testator of the defendant in his lifetime. If more than this is sought to be deduced from the case of *Lee v. Cooke's Executor*, the attempt would bring the case in conflict with that of *Harris v. Crenshaw*, and with the opinion of Green, Justice, in the case of *Thweatt's Administrator v. Jones's Administrator*, both more recent in point of time, as well as more explicit in their interpretation alike of the English statute and that of Virginia.

In cases analogous to the one before us, or which rather must be viewed as identical in their essential features, the principles hereinbefore deduced from the laws and decisions of Virginia, have been directly affirmed. Thus, in the case of *Coker v. Crozier*, *in the 5th vol. of Alabama Rep. 369, it was ruled, that in [* 224] an action on the case for a fraud committed in the exchange of horses, upon the death of the defendant the suit could not be revived against his personal representative, the rule of the common law forbidding such revival, and there being no statute of the State to authorize it.

The case of *Read et al. v. Hatch*, from the 19th vol. of Pick. 47, bears a still stronger resemblance to the case before us, than does that just cited from the supreme court of Alabama. So exact, indeed, is this resemblance, that it might with justice be said, of the case of *Read v. Hatch*, in comparison with this under our consideration, *mutato nomine historia narratur de te*. The former was an action for fraudulently recommending a trader as in good credit, by means whereof the plaintiff was induced to sell him goods on credit, and thereby sustained damage. This action was founded on the 7th

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section of the 93d chapter of the Revised Statutes of Massachusetts, which provides that actions of trespass and trespass on the case for damage done to real or personal estate shall survive. Pending the suit the defendant died, and the plaintiff moved to cite in his administrator. Shaw, Chief Justice, said, in pronouncing the judgment of the court: "The question whether the plaintiffs can cite in an administrator, and proceed with their action, depends on Revised Stats. c. 93, § 7. It is contended that a false representation, by which one is induced to part with his property by a sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction. If this were the true construction, then every injury by which one should be subjected to pecuniary loss would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damage done to some specific personal estate of which one may be the owner. A mere fraud or cheat by which one sustains a pecuniary loss, cannot be regarded as a damage to personal estate. The action is abated at common law, and, not surviving by force of the statute, must be deemed to stand abated."

Upon full consideration of the statutes of Virginia, and of the interpretation placed by the courts of that State upon those statutes, and of every analogy which can be applied from similar provisions elsewhere, we are of the opinion, that in the circuit court this action did not survive the death of the defendant, but abated upon the occurrence of that event; and we order it to be certified accordingly to the circuit court, in reply to the certificate of division.

THE UNITED STATES, *ex relatione* BEVERLY TUCKER, Plaintiff in
Error, v. A. G. SEAMAN, Superintendent of Public Printing.

17 H. 225.

A *mandamus* should not be granted to compel the superintendent of public printing of the houses of congress, to place a document in the hands of the printer of the senate, instead of in the hands of the printer of the house of representatives.

ERROR to the circuit court for the District of Columbia. The case is stated in the opinion of the court.

Chilton and Johnson, for the plaintiff.

Cushing, (attorney-general,) *contra*.

* TANEY, C. J., delivered the opinion of the court. [* 229]

The defendant in error, at the times hereinafter mentioned, was, and still is, superintendent of public printing of the two houses of congress; and the relator printer to the senate, and O. A. P. Nicholson printer to the house of representatives.

By the act of August 26, 1852,¹ it is made the duty of the superintendent to receive, from the secretary of the senate and the clerk of the house of representatives, all matter ordered by congress to be printed, and to deliver it to the public printer or printers. And the 12th section provides, that when any document shall be ordered to be printed by both houses of congress, the entire printing of such document shall be done by the printer of that house which first ordered the printing.

On the 31st of January, 1854, the commissioner of patents communicated to the senate that portion of his annual report for 1853 which relates to arts and manufactures, which that body, on the same day, ordered to be printed; and, on the following day, it was communicated to the house of representatives, who passed a similar order. This communication was delivered by the superintendent to the relator.

On the 20th of March, 1854, the commissioner communicated to both houses the agricultural portion of his report, which each house, on the same day, ordered to be printed; the order of the house of representatives being, it is admitted, first made.

The relator claimed, that the report of the commissioner of patents was but one document, within the meaning of the act of congress above referred to, and that, by virtue of the order of the senate of the 31st of January, 1854, he was entitled to the printing

* of the agricultural portion of the report, although the [* 230] printing of this part was first ordered by the house of representatives. The superintendent, however, refused to deliver it; and the relator thereupon applied to the circuit court for the District of Columbia for a *mandamus* to compel the delivery. That court was of opinion that it had not jurisdiction of the case, and refused the *mandamus*. And this writ of error is brought by the relator.

The power of the circuit court of this District to issue writs of *mandamus* to an officer of the government in Washington, has frequently been the subject of discussion in this court. It was before the court in *Kendall v. Stokes*, 12 Pet. 524; in *Decatur v. Paulding*, 14 ibid. 497; in *Brashear v. Mason*, 6 How. 92; and again, in *Goodrich v. Guthrie*, at the present term. The rule to be gathered from all of these cases is too well settled to need further discussion. It

¹ 10 Stats. at Large, 30.

cannot issue in a case where discretion and judgment are to be exercised by the officer; and it can be granted only where the act required to be done is merely ministerial, and the relator without any other adequate remedy.

Now, it is evident that this case is not one in which the superintendent had nothing to do but obey the order of a superior authority. He had inquiries to make, before he could execute the authority he possessed. He must examine evidence; that is to say, he must ascertain in which house the order to print was first passed. He may, it is true, generally obtain this from the journals of the two houses, but yet he must examine them, and compare the dates of the orders; and, in this particular case, it may even have been necessary to take oral testimony, before he could determine the fact of priority, as the order was passed in each house on the same day. And, after he had made up his mind upon this fact, it was still necessary to examine into the usages and practice of congress, in marking a communication in their proceedings as a document;—and to make up his mind whether separate communications upon the same subject, or on different subjects from the same office, when made at different times, were, according to the usages and practice of congress, described as one document, or different documents, in printing and publishing their proceedings. He was obliged, therefore, to examine evidence, and form his judgment before he acted; and, whenever that is to be done, it is not a case for a *mandamus*.

Nor is there any reason of public policy or individual right, which requires that this remedy should be extended beyond its legitimate bounds, in order to embrace cases of this description; for it would embarrass the operations of the legislative and executive [* 231] * departments of the government, if the court of this District was authorized to interfere, by this summary process, in controversies between officers, in their respective employments, whenever differences of opinion as to their respective rights may arise. If these differences cannot be adjusted by the authorities under which they are acting, an ordinary action at law would be an adequate remedy for any injury sustained.

It seems to be supposed that the case of *Kendall v. Stokes* justified this application; but it is altogether unlike it. The award of the solicitor of the treasury, in that case, was an official act; he was the officer appointed by act of congress¹ to settle that account, and determine the amount of credit to which Stokes was entitled, if to any; and all that the postmaster-general was required to do was, to enter it in the books of the department, when reported to him by the

¹ 6 Stats. at Large, 665.

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solicitor of the treasury. He was merely to record it. His duty, under that act of congress, was like that of a clerk of a court, who is required to record its proceedings; or, of an officer appointed by law to record deeds, which a party has a right by law to place on record; or of the register of the treasury of the United States, to record accounts transmitted to him by the proper accounting officers, to be recorded. The duty, in such cases, is merely ministerial; as much so as that of a sheriff or marshal to execute the process of a court.

This was the point decided in *Kendall v. Stokes*, and the subsequent cases have all been decided upon the same principles. They are in no degree in conflict with it; on the contrary, they have followed it.

But the case before us, for the reasons above stated, is unlike that of *Kendall v. Stokes*, and the circuit court were right in refusing the *mandamus*. The judgment must, therefore, be affirmed.

7 Wal. 347.

CHARLES H. McBLAIR, Administrator of LYDE GOODWIN, deceased,
v. ROBERT M. GIBBES and CHARLES OLIVER, Executors of ROBERT
OLIVER, deceased.

17 H. 232.

Though a collateral contract, made in aid of one tainted by illegality, cannot be enforced, yet a *bonâ fide* purchaser for value, of an illegal claim, who has received the proceeds thereof, cannot be compelled by the assignor's representatives or creditors, to account therefor; and if the claim was legalized before the proceeds were received, the assignee may rely on his assignment as valid.

Distinction between contracts tainted with illegality, and those collateral thereto and not affected by the taint.

THE case is so far stated as to be intelligible, in the opinion of the court. Reference may also be had to other branches of the same controversy which appear in 11 How. 529, 12 How. 111, 14 How. 610.

Davis and *R. N. Martin*, for the appellant.

J. M. Campbell and *Johnson*, contra.

* NELSON, J., delivered the opinion of the court. [* 233]

This is an appeal from a decree of the circuit court of the United States for the district of Maryland.

The bill was filed by the administrator of Lyde Goodwin against the executors of Robert Oliver, to recover the proceeds of a share in an association called the Baltimore Company, which
* had a claim against the Mexican government, that was [* 234]
allowed under the convention of 1839,¹ "for the adjustment

¹ 8 Stats. at Large, 526.

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of claims of citizens of the United States against the Mexican Republic." The claim of the company was founded on a contract with General Mina, in 1816, for advances and supplies in fitting out a military expedition against the dominions of the king of Spain. The bill also sought to recover a commission of five per centum, which the members of the company had agreed to give to Goodwin, for his services as agent in soliciting the claim against Mexico. The share and commissions, as charged, amount to \$67,337.15.

The executors of Oliver set up a right to retain the fund for the benefit of the estate, under and by virtue of a purchase of Goodwin's share in this company, and also of his right to the commissions, by their testator, in 1829. The purchase and transfer took place the 30th May, in that year, for a good and valuable consideration.

A question was made on the argument, whether or not the assignment of Goodwin was sufficiently comprehensive to include a right to the commissions as well as to the proceeds of the share. We are satisfied that it is. The language is very broad: "All my undivided ninth part, right, title, and interest, of every kind whatever, in the claim on the government of Mexico," &c. And again: "The object and intention of this agreement is to make a full and complete transfer to the said Robert Oliver, of all my right, title, and interest aforesaid," &c. The commissions were dependent upon the allowance of the claims of the company against Mexico, and, of course, an interest intimately connected with them; without the allowance of the one, the other would be valueless.

The understanding of Goodwin himself, of the intention and effect of the assignment, accords with this view, as derived from his deposition taken in behalf of the claims of the company, and used before the board of commissioners; and also from his testimony in the proceedings before the Baltimore county court, for the distribution of the fund among the several claimants.

This share of Lyde Goodwin in the company, and his commissions, have heretofore been the subject of consideration in this court. The case is reported in 11 How. 529. George M. Gill, the permanent trustee of Goodwin, who had taken the benefit of the insolvent laws of Maryland in 1817, claimed this fund before the Baltimore county court as part of the estate of the insolvent, against the right and title of the executors of Oliver, claiming under this assignment of 1829. The Baltimore county court held that the fund passed by the insolvent assignment of 1817, to Gill, the permanent [* 235] trustee. The case was *taken to the court of appeals of Maryland, where the decree was reversed, and the fund distributed to Oliver's executors, the appellate court holding that the

contract of the company with General Mina was made in violation of the neutrality act of the United States of 1794, and, being thus founded upon an illegal transaction, constituted no part of the property or estate of the insolvent within the meaning of the Maryland insolvent laws. Gill brought the case to this court under the 25th section of the judiciary act, for the purpose of revising that decision; but the court dismissed the case for want of jurisdiction, a majority of the judges holding that the only question involved in the decision below was the true construction of a statute of the State, and that it belonged to the Maryland court to interpret its own statutes. Whether that interpretation was right or wrong, was a matter with which this court had no concern.

Gill, the permanent trustee, having thus failed to establish a title to the fund under the Maryland insolvent laws, the litigation is again revived respecting the fund, in behalf and for the benefit of the personal representatives of Goodwin, on the ground that the moneys realized upon the contract with General Mina, from the Mexican government, is to be regarded as a subsequent acquisition of property by the insolvent, belonging to his estate, and to be dealt with accordingly.

Hence this bill filed against the executors of Oliver to recover possession of the fund. The defence set up to this demand of the administrator of Goodwin, and which it is insisted is conclusive against him, is the assignment of the contract of General Mina, by Goodwin himself, to Robert Oliver, in 1829, which has been already referred to; that having thus parted with all his right or claim to that contract, for a full and valuable consideration, the proceeds thereof derived from the recognition and fulfilment by the Mexican government belong to the estate of Oliver, and not to that of Goodwin; and vested his executors with the equitable right to receive the moneys, and which have been paid accordingly under the decree of the court of appeals of Maryland, in making a distribution of the fund.

It is urged, however, in answer to this view, that the contract with General Mina being illegal, the sale and assignment of it from Goodwin to Oliver must also be illegal, and consequently that no interest therein, equitable or legal, passed to Oliver's executors.

But this position is not maintainable. The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly independent * of, the illegal transactions upon which the princi- [* 236]

pal contract was founded. Oliver was not a party to these transactions, nor in any way connected with them.

It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making or in the fulfilment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defence, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfilment depended altogether upon the voluntary act of Mina, or of those representing him.

No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And, if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself. In *Faikney v. Renous*, 4 Burr, 2069, where two persons were jointly concerned in an illegal stock-jobbing business with a third, and a loss having arisen, one of them paid the whole, and took a security from the other for his share, the security was held to be valid as a new contract, uninfected by the original transaction. And in *Petrie v. Hannay*, 3 T. R. 418, where one of the partners, under similar circumstances, paid the whole at the instance of the other, he was allowed to recover for the proportionate share. These cases are examined and approved in *Armstrong v. Toler*, 11 Wh. 258.

In *Tenant v. Elliot*, 1 B. & P. 3, the defendant, a broker, effected an insurance for the plaintiff which was illegal, being in violation of the navigation laws; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality, upon which an action for money had and received was brought. The plaintiff recovered, on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction. The same principle was applied and

enforced in the case of *Farmer v. Russell*, 1 B. & P. 296.

[* 237] * In *Thomson v. Thomson*, 7 Ves. 470, there had been a

sale of the command of an East India ship to the defendant, and as a consideration he stipulated to pay an annuity of £200 to the previous commander so long as he should continue in command of the ship.

This contract of sale was illegal. Subsequently, the defendant relinquished the command, and another person was appointed in his place. But, under the regulation adopted by the East India Company to prevent the sale of the commands of their ships, an allowance was made to the defendant, on his retiring, of £3,540.

The bill in this case was filed for the purpose of procuring a decree for the investment of a portion of this fund to satisfy the annuity of £200, praying that the value of it might be ascertained and paid out of the money allowed by the company.

The objection made was, that the contract providing for the annuity was illegal, and a court of equity, therefore, would not interfere.

The master of the rolls, Sir William Grant, agreed that the contract was illegal; he admitted there was an equity against the fund, if it could be reached by a legal agreement; but observed, "you have no claim to this money, except through the medium of an illegal agreement, which, according to the determinations, you cannot support." "If the case," he further observed, "could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing the trust;" "but in this instance the money is paid to the party." "There is nothing collateral in respect to which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences."

So, in *Sharp v. Taylor*, 2 Ph. Ch. R. 801, the bill was filed, among other things, to recover a moiety of the freight money, the whole of which had come into the hands of one of the joint owners. The defence set up was, that the trade in which the vessel had been engaged, and in which the freight had been earned, was in violation of the navigation laws, and illegal. But lord chancellor Cottenham answered, that the plaintiff was not asking for the enforcement of an agreement adverse to the provision of the act of parliament, nor seeking compensation and payment for an illegal voyage; that, he observed, was disposed of when Taylor, the defendant, received the money; the plaintiff was seeking only his share of the realized profit.

Again, he observed, can one of two partners possess himself of

the property of the firm, and be permitted to retain it, if he [* 238] * can show that, in realizing it, some provision in some act of parliament has been violated? The answer is, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do as between the parties. The difference, he observes, between enforcing illegal contracts, and asserting title to the money which has arisen from them, is distinctly taken in *Tenant v. Elliot*, and *Farmer v. Russell*, and recognized by Sir William Grant, in *Thompson v. Thompson*.

These cases show that the assignment of Lyde Goodwin to Robert Oliver, in 1829, being collateral to, and disconnected from the illegal transaction out of which the Mina contract arose, was valid and binding upon Goodwin, and vested in Oliver all the benefits and advantages, whatever they might be, derived from that contract.

The assignment from Goodwin to Oliver, though the assignment of an illegal contract—which contract, therefore, imposed no legal obligation, and rested simply upon the honor of the parties—was not within the condemnation of the Maryland insolvent laws, as expounded by her courts, as the right was not derived under but entirely independent of them. Those laws have no application to this assignment.

And further, that the money having been realized by his executors, according to the purpose and object of the assignment, becomes a part of the assets of the estate, which belong to the personal representatives.

Another ground may be briefly stated, which, in our judgment, is equally conclusive against the complainant. The assignment of 1829, of the Mina contract, not being tainted with illegality, and therefore obligatory upon Goodwin, if he were alive and claiming the fund against the representatives of Oliver, having parted with all his right in the subject to their testator, for a valuable consideration, would be estopped from setting up any such claim, and, of course, his personal representatives can be in no better situation.

We have not deemed it necessary to look into the case for the purpose of ascertaining whether Goodwin, at the time of the proceedings in the Baltimore county court, had such notice of them as required that he should have appeared there and asserted his right; and hence, that the decree of that court, in the distribution of the fund, was conclusive upon such right. That question is unimportant, inasmuch as, in our opinion, the executors of Oliver have, independently of that ground, established a complete title to the fund in controversy.

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We think the decree of the court below was right, and should be affirmed.

* TANEY, C. J. I shall state my opinion in this case, in [*239] the cases of Williams's administrator, and Gooding's administrator, as the three cases are nearly connected, and depend on the same principles.

18 H. 289, 507; 20 H. 535; 23 H. 500; 24 H. 317; 2 Wal. 70.

JOHN S. WILLIAMS, Administrator of JAMES WILLIAMS, deceased,
Appellant, v. ROBERT M. GIBBES and CHARLES OLIVER, Execu-
tors of ROBERT OLIVER, deceased.

17 H. 239.

The effect of a decree of the court of appeals of Maryland, concerning the fund here in controversy, examined, and declared.

A decree in chancery, for the distribution of a common fund among those interested, does not conclude one who was not a party to the decree, and who was guilty of no laches. It protects the trustee who makes distribution pursuant to it; but the fund may still be followed, and his just portion reclaimed, by one not a party, nor negligent.

THE case is so far stated, as to be intelligible, in the opinion of the court. Reference may also be had to 11 H. 529; 12 H. 111; 14 H. 610, and the next preceding case in this volume, where other branches of the same and similar controversies appear.

Davis and Dulany, (with whom was *Martin*,) for the appellant.

J. M. Campbell and Johnson, contra.

* NELSON, J., delivered the opinion of the court. [*249]

This is an appeal from a decree of the circuit court of the United States for the district of Maryland.

The bill was filed in the court below to recover of the defendants the proceeds of the share of James Williams, in what is called The Baltimore Company, which had a claim against the Mexican government, that was allowed under the convention of 1839.¹ The claim was similar to the one under consideration in the case of the administrator of Lyde Goodwin against these defendants, just disposed of. The proceeds of the share, as charged, amount to \$41,306.41.

The main grounds of defence set up in this case are : —

1. The sale of this share in the company to Robert Oliver, for a valuable consideration, by George Winchester, permanent trustee

¹ 8 Stats. at Large, 526.

of Williams, who had taken the benefit of the insolvent act of Maryland, in 1819, which was made in pursuance of an order of the court having jurisdiction in cases of insolvency under that act. The sale took place on the 2d April, 1825.

2. A decree of the court of appeals in Maryland, at the June term, 1849, affirming a decree of the Baltimore county court, which, in the distribution of the fund arising from this claim of the Baltimore Company, assigned the proceeds of the share in question to the executors of Oliver.

If the appellees fail to maintain their title to this fund, upon one or the other of these grounds, then the right to the share of Williams in the Baltimore Company, for aught that appears, still belonged to him at the time of his decease, in 1836, and passed to his legal representatives as a part of his estate; and although originally of no legal value, on account of the illegality of the transaction out of which the contract arose, yet, as the illegality has been waived and the money realized, we have seen, from the principles stated in the previous case of Lyde Goodwin, it belongs to Williams's administrator.

As it respects the first ground — the sale of the share of Williams, by the provisional trustee, to Robert Oliver, under the insolvent act — we have seen, in the case of Lyde Goodwin, the court of appeals of Maryland held, that this contract of the Baltimore Company with General Mina, being in violation of *the neutrality act of the United States, of 1794,¹ was so tainted with turpitude and illegality, it could not be recognized under their insolvent laws as property; and that no right to or interest in the share passed to the trustee. And, that this being the construction of the statute by the highest court of the State, and which had a right to interpret its own laws, this court felt bound by it, without inquiring whether that interpretation was correct or not; and, consequently, as Goodwin's interest in the share did not pass to the insolvent trustee, it remained in Goodwin himself, and passed to the executors of Oliver by virtue of his assignment to their testator, in 1829.

In this case, the executors of Oliver are obliged to make title to the share in question, under the insolvent trustee of Williams; the assignment to Oliver, their testator, having been made by the trustee, and not by Williams himself. And it is now insisted on behalf of the executors, that the court of appeals of Maryland in this case reversed their opinion delivered in the case of Goodwin, and held that the interest in the share did pass under the insolvent laws to

¹ 1 Stats. at Large, 381.

the trustee, and consequently that the proceeds of the share vested in them under his sale and assignment to their testator in 1825.

Had this been the decision of the court of appeals in the case of the share of Lyde Goodwin, the interest and proceeds would have passed to Gill, the permanent trustee, instead of to the executors of Oliver.

These results, so contradictory and inconsistent, claimed too as flowing from the judgments of the highest court in a State, should not be admitted unless compelled, after the most careful and deliberate consideration.

The decision in both cases was made at the same term, June, 1849; the one in the present case subsequent to that in the case of Goodwin. The court, in their opinion, state, that the grounds upon which they affirmed the judgment in this case were, first, for the reasons assigned by them for their decree in the previous case of Oliver's executors against Gill, permanent trustee of Goodwin.

The grounds for that decree are stated in the record, and as far as material are as follows: "They are of opinion that the entire contract, (the Mina contract,) upon which the claim of the appellee, (Gill, the trustee,) is founded, is so fraught with illegality and turpitude as to be utterly null and void; conferring no rights or obligations upon any of the contracting parties, which can be sustained or countenanced by any court of law or equity in this State; that it has no moral obligation to support it, and that, therefore, under the insolvent laws of Maryland, such claim does not pass to or vest in the trustee of an insolvent *petitioner. It forms no [* 251] part of his property or estate, within the meaning of the legislative enactments constituting our insolvent laws."

Nothing can be more explicit or decisive against the title of the insolvent trustee, or of those setting up a claim under him, to a share in this Baltimore Company. The court say: "It has no legal or moral obligation to support it, and that, therefore, under the insolvent laws of Maryland, such a claim does not pass to or vest in the trustee of an insolvent petitioner. It forms no part of his property or estate, within the meaning of the legislative enactments constituting our insolvent system." And this opinion is reaffirmed, *ipsissimis verbis*, in giving the judgment against the trustee of Williams, then before the court, and with which we are now dealing; and yet it is gravely insisted that no such decision was made in this case as was made in the case of Goodwin; but, on the contrary, the court decided that the interest in the share of Williams did pass under the insolvent laws to the trustee; that he became thereby invested with the title,

and was competent to transfer it to Robert Oliver, the testator of the defendants.

The supposed contradiction and inconsistency of the determination of the court is founded upon the second paragraph in the opinion delivered. It is as follows: 2. "Because, under the proceedings based on or originating from the insolvent petitions of John Gooding and James Williams, and the act of assembly applicable thereto, Robert Oliver acquired a valid title to all the interest of said James Williams and John Gooding in the fund in controversy, for the reasons assigned by Judge Martin as the basis of his opinion in those cases."

Judge Martin had dissented from the opinion of the majority of the court, in the case of Lyde Goodwin, being of opinion that the interest in his share passed under the insolvent laws to the trustee; and had maintained the same opinion in respect to the share of Williams, in the case then before the court. And it is supposed that this opinion was adopted by the other members, in the determination of the case.

We do not agree that this is a proper apprehension of the judgment given by the two members of the court; but, on the contrary, are satisfied that the opinion delivered may well warrant a more natural and consistent interpretation.

The true meaning will be apparent, we think, from the following explanation. Robert Oliver, as we have seen, had purchased the share of Williams of the insolvent trustee, in 1825, and consequently, if the interest in his share passed under the insolvent laws to the trustee, it had become vested in Oliver, and of course, on his death, in the executors.

[*252] * The question before the court was between the insolvent trustee and the executors. The court, after reaffirming their opinion in the case of Lyde Goodwin, namely, that no interest in the share passed to the trustee under the insolvent laws, and, therefore, that he was disabled from making out a title to it, go on in substance to say, that if in error as to this, and the opinion of Judge Martin should be adopted, namely, that the interest did pass to the trustee, it could make no difference in the result, inasmuch as the executors of Oliver would then be entitled to the proceeds, under his purchase of the share from the trustee himself, in 1825. Therefore, viewing the case in either aspect, *quacunque via data*, the insolvent trustee had failed in establishing any interest in the fund.

It appears to us that this is obviously the meaning intended to be expressed, though we admit the terms used in the expression of it furnish some plausibility for the criticisms to which it has been subjected. The two opinions, the one in the case of Goodwin, and the

other in the case of Williams, were given at the same term, and upon the same question; and, if the interpretation of the defendants is right, are diametrically opposite to each other; and not only so, as the first opinion is incorporated in the second, the judgment rendered in the case of Williams is founded upon two opposite constructions of the same statute, in one and the same opinion.

We prefer the explanation we have given to this extraordinary and absurd conclusion, as it respects the proceedings of a respectable court, and one possessing the highest jurisdiction in the State.

The change of opinion upon a question of law, or in the construction of a statute, is no disparagement to a judge, or a court, however eminent or experienced. The change is oftentimes a matter of commendation, rather than of reproach. But the case here presented, and upon which we are asked to turn the decision of the question, is, that two opposite constructions of a statute have been given by the court in the same cause, leading necessarily to opposite results, and both relied on as grounds for the judgment rendered. We have already assigned our reasons for disbelief in any such conclusion, and shall not again refer to them.

It has been suggested that the statute of Maryland, of 1841, confirming certain defective proceedings in insolvent cases, operated to confirm the sale of the trustee to Oliver, in 1825, and that the opinion of the court of appeals in the case of Williams is founded upon this statute. Winchester, the permanent trustee at the time of the sale, had not given a bond, with surety, for the faithful execution of his duty, as required by the law; and, *under the decis- [* 253] ions of the courts of Maryland, this omission disabled him from dealing with the estate of the insolvent.

The act of 1841 was passed to remedy defects of this description. It provided that all sales and transfers of property and claims, theretofore made by any permanent trustee, &c., under the insolvent laws of the State, shall be valid and effectual, notwithstanding such trustee shall not have given a bond with security, &c.; and the 3d section provides that the act shall not be so construed as to cure any other defect in the proceedings than the failure to give a bond, with security, or the want of any ratification by the court of any sale made by such trustee.

It is quite apparent from the provisions of the act, that it was not designed to confirm all sales previously made by the trustee under the insolvent laws, and render them valid and effectual, but simply to confirm, so far as respected any defect arising out of the omission of the trustee to give the proper security, and also as respected any omission on the part of the court to confirm the sale. These two

defects in any previous proceedings were cured by the statute, but in all other respects the proceedings were valid, or otherwise independently of it. It is impossible to maintain that the statute looked to any such informality in the title of the trustee, as that held by the court of appeals in the case of Lyde Goodwin, as well as in the present one. And, besides, it is inconceivable why the court should have reaffirmed their opinion in the case of Goodwin, as a ground for denying the title to the trustee, if they had intended to hold that it passed by force of the act of 1841. We have no belief that such was the opinion intended to be expressed.

The decree of the court affirming the judgment of the court below, has been referred to as favoring the view of the decision contended for by the appellees. This decree adjudges and decrees, that the judgment below, awarding the share of Williams to the executors of Oliver, be affirmed, and that Glenn and Perine, the general trustees of the fund, pay the proceeds of the share to the said executors.

It will be remembered that the only question before the court respecting this share, was between the executors on the one side, and the insolvent trustee of Williams on the other; and as the executors were the apparent owners of the fund, unless a title could be maintained by the trustee, so far as respected the parties before the court, the former exhibited the better title; at least, the better title to take the possession and charge of the fund in the distribution among the claimants. The form of the decree, therefore, was very much a matter of course, in the aspect of the case as then presented.

This view will be more fully appreciated when we refer [* 254] to *another branch of this case, presently to be considered.

We will simply add, in our conclusion upon this part of the case, that the opinion now expressed was the one entertained by us when the case involving this share of Williams was formerly before the court, and which will be found in 12 How. 111, 123.

On page 123, we observed "the counsel for the plaintiff in error sought to distinguish this case from the previous one, the case of Lyde Goodwin, and to maintain the jurisdiction of the court, upon the ground that the act of the legislature of Maryland of 1841, confirming the authority of Winchester, the permanent trustee, was in contravention of a provision of the constitution of the United States, as "a law impairing the obligation of contracts."

But we observed in answer, "admitting this to be so, which we do not, still, the admission would not affect the result; for the decision of the court of appeals upon a previous branch of the case denied to the plaintiff any right to or interest in the fund in question, as claimed under the insolvent proceedings as permanent trustee, and hence he

was deemed disabled from maintaining any action founded upon that claim.

“It was of no importance, therefore, as it respected the plaintiff, in the distribution of the fund, whether it was rightfully or wrongfully awarded to Oliver’s executors. He had no longer any interest in the question.”

Our conclusion, therefore, upon this part of the case is, that according to the law of Maryland, as expounded by the highest court of the State, no title to or interest in the share of Williams in the contract of the Baltimore Company, under General Mina, passed under the insolvent laws of that State to the insolvent trustee; and, consequently, no interest in the same became vested in the executors of Robert Oliver, by force of the assignment from the trustee to him in 1825.

2. The next question is as to the conclusiveness of the decree of the Baltimore county court, making a distribution of the fund among the several claimants, and which was affirmed by the court of appeals, upon the rights of the administrator of Williams to the proceeds of his share in the fund. The decree in the Baltimore county court was rendered in December, 1846, and affirmed June term, 1849.

Williams died in 1836, and no letters of administration were taken out upon the estate till 1852. It appears, therefore, that Williams had been dead ten years when the first decree was made, and thirteen at the date of the second; and no representative was in existence to whom notice of the proceedings could affect in any way the interest of the estate in the fund.

Now, the principle is well settled, in respect to these proceedings *in chancery for the distribution of a common fund [*255] among the several parties interested, either on the application of the trustee of the fund, the executor or administrator, legatee, or next of kin, or on the application of any party in interest, that an absent party, who had no notice of the proceedings, and not guilty of wilful laches or unreasonable neglect, will not be concluded by the decree of distribution from the assertion of his right by bill or petition against the trustee, executor, or administrator; or, in case they have distributed the fund in pursuance of an order of the court, against the distributees. *David v. Frowd*, 1 Miln. & Keen, 200; *Greig v. Somerville*, 1 Russ. & M. 338; *Gillespie v. Alexander*, 3 Russ. 130; *Sawyer v. Bichmore*, 1 Keen, 391; *Shine v. Gough*, 1 Ball. & B. 436; *Finley v. Bank of United States*, 11 Wheat. 304; *Story’s Eq. Pl. § 106*, *Wiswall v. Sampson*, 14 How. 52, 67.

The general principle governing courts of equity, in proceedings of this description, is more clearly stated by Sir John Leach, mas-

ter of the rolls, in *David v. Frowd*, above referred to, than in any other case that has come under our notice.

That was a case where one of the next of kin, who had no notice of the administration suit, filed a bill against the administratrix and distributees to obtain her share of the estate. The bill was filed some two years after the decree for distribution had been made and carried into effect.

The master of the rolls observed, that "the personal property of an intestate is first to be applied in payment of his debts, and then distributed among his next of kin. The person who takes out administration to his estate, in most cases, cannot know who are his creditors, and may not know who are his next of kin; and the administration of his estate may be exposed to great delay and embarrassment. A court of equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator. Upon the application of any person claiming to be interested, the court refers it to the master, to inquire who are creditors, and who are next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in, and make their claims before the master, within a reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate among those who have, before the master, established an apparent title. Such proceedings having been taken, the court will protect the administrator against any future claim."

[* 256] * "But it is obvious," he remarks, "that the notice given by advertisements may, and must in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or, from a multitude of circumstances, they may not see or hear of the advertisements, and it would be the height of injustice that the proceedings of the court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owners to one who has no right to it."

The master of the rolls further observed: "That if a creditor does not happen to discover the proceedings in the court, until after the distribution has been actually made, by the order of the court, amongst the parties having, by the master's report, an apparent title, — although the court will protect the administrator, who has acted

under the orders of the court, — yet, upon a bill filed by this creditor against the parties to whom the property has been distributed, the court will, upon proof of no wilful default on the part of such creditor, and no want of reasonable diligence on his part, compel the parties, defendants, to restore to the creditor that which of right belongs to him.” The master of the rolls then applied this principle to the right of the next of kin, the complainant in the bill, and observed: “That it had been argued that the case is extremely hard upon the party who is to refund, for that he has a full right to consider the money as his own, and may have spent it; and that it would be against the policy of the law to recall the money, which the party had obtained by the effect of a judgment upon a litigated title. But, he observed, there is here no judgment upon a litigated title; the party who now claims by a paramount title was absent from the court, and all that is adjudged is, that, upon an inquiry, in its nature imperfect, parties are found to have a *prima facie* claim, subject to be defeated upon better information. The apparent title, under the master’s report, is, in its nature, defeasible. A party claiming under such circumstances, has no great reason to complain that he is called upon to replace what he has received against his right.”

In the case of *Gillespie v. Alexander*, also above referred to; Lord Eldon observed, that, although the language of the decree, where an account of debts is directed, is, that those, who do not come in, shall be excluded from the benefit of it; yet the course is to permit a creditor, he paying costs, to prove his debt, as long as there happens to be a residuary fund in court, or in the hands of the executor, and to pay him out of the residue. If the creditor does not come till after the executor * has paid away the residue, he [* 257] is not without remedy, though he is barred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so, but he cannot affect the legatees, except by suit, and he cannot affect the executor at all.

These principles are decisive of this branch of the case, as they establish, beyond all controversy, the right of the administrator to assert the title of Williams, the intestate, to the proceeds of the share in question, notwithstanding the decree of distribution by the Baltimore county court. There has been no laches, on his part, or on the part of those whom he represents.

The cases above referred to relate to the rights of creditors, and next of kin; but the principle is equally applicable to all parties interested in a common fund brought into a court of equity for distribution amongst the several claimants.

It is worthy of observation in this connection that the decree, how-

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ever conclusive in its terms, in the distribution of the fund amongst the apparent owners then before the court, possesses no binding effect upon the rights of the absent party, whose interests have not been represented on the subject of litigation. The opinion of the court given, and decree in pursuance thereof, applies only to interests of those amongst whom the fund is distributed.

These observations furnish an answer to the argument on behalf of the appellees, drawn from a reference to the terms of the decree of the court of appeals of Maryland, in this case, by which the fund is adjudged to the executors of Oliver. As between all the parties then before the court, this adjudication was doubtless proper, and conclusive upon their rights.

It is agreed in the case, that but five eighths of the fund in controversy is in the hands of the executors, the residue having been paid over in the administration of the assets of the estate.

If this portion had been paid over by the executors in pursuance of an order of the court in an administration suit, the defendants would be protected to that extent, and the complainant compelled to proceed against the distributees. But no such fact appears in the case.

Without saying, at this time, that an executor, in all cases, may be compelled to account to a party making title to a portion of the estate, after distribution among the legatees and next of kin, unless first procuring an order of the court having charge of the administration, we perceive no reason, under the circumstances of this case, for exonerating them, or turning him round to a bill against the distributees.

Upon the whole, after the fullest consideration we have [*258] been able to give to this case, we think that the decree of the court below was erroneous, and should be reversed.

Taney, C. J., M'Lean, J., and Daniel, J., dissented.

John S. Williams, administrator of James
Williams, deceased appellant.

v.

Robert M. Gibbs and Charles Oliver, ex-
ecutors of Robert Oliver, deceased.

and

John Gooding, Jr., administrator *de bonis
non* of John Gooding, deceased, appel-
lant,

v.

Robert M. Gibbs and Charles Oliver, ex-
ecutors of Robert Oliver, deceased.

} Appeals from the circuit
court of the United
States for the district
of Maryland.

* TANEY, C. J., dissenting.

I dissent from the opinion in these two cases; but they are so intimately connected with the case against Lyde Goodwin's administrator, just decided, that I shall be better understood by considering the three together.

When the case of Gill (who was trustee of Goodwin under the insolvent laws of Maryland) against Oliver's executors, was before the court, I did not concur in the judgment then given, as will be seen by the report of the case in 11 How. 529. It appeared to me unnecessary at that time to do more than simply express my dissent; but the course which these cases have since taken, and the decisions now given, make it my duty to state more fully my own opinion, and the grounds upon which I passed the decrees that are now before the court.

The history of the controversy is this: Goodwin, Gooding, and Williams, were members of the Baltimore Mexican Company, which made the contract with Mina, in 1816. The character of that contract is fully stated in the eleventh and twelfth volumes of Howard's Reports, and also the manner in which it came before the commissioners under the treaty with Mexico, and their award upon it.

The commissioners awarded the sum mentioned in their award to the Mexican Company of Baltimore, as due "for arms, vessels, munitions of war, goods, and money, furnished by the company to General Mina for the service of Mexico in the years 1816 and 1817," and gave interest to the company according to * the [* 259] stipulation in the contract with Mina. I have given the words of the award, because they show that the commissioners affirmed the validity of this contract, and directed the amount due by its terms, to be paid to the trustees therein named, for the benefit of the parties interested in it.

Proceedings were soon after instituted in a Maryland court of equity, against the trustees by persons claiming an interest in the fund; and the money, by order of the court, was brought into court to be distributed among the parties entitled. Many claimants appeared, presenting conflicting claims for shares in the company.

Goodwin, Gooding, and Williams, all became insolvent. Goodwin in 1817, Gooding and Williams in 1819; and their respective trustees appeared in the Maryland court, and claimed the amount due to the insolvent.

On the other hand, the executors of Oliver claimed these three shares. Goodwin's, under an assignment, made to Oliver by Goodwin in 1829, and the other two, under assignments, made to him in 1825, by George Winchester, who was the trustee of each of them.

The controversies which arose upon the distribution of this fund, were removed to the Maryland court of appeals, which is the highest court of the State. And in the trial there, it was objected that the contract with Mina was in violation of law, and therefore fraudulent and void, and vested no rights in the members of the company which the law would recognize, and, consequently, that no right of property in it could vest in the trustee when the party became insolvent.

It may be proper to remark that, under the Maryland insolvent law, all the property, rights, and credits belonging to the insolvent at the time of his petition, become vested in his trustee; and he at the same time executes a deed to the trustee, conveying and assigning to him all his property, rights, and credits of every description for the benefit of his creditors. And if the persons above named, at the times of their petitions, in 1817 and 1819, had any interest whatever, either legal or equitable, vested or contingent, under this Mexican contract, it passed to their trustees.

The court of appeals decided that the contract with Mina was fraudulent and void under our neutrality laws, and therefore vested no right in the parties which a court of justice in this country could recognize, and, consequently, that they had no interest or property under it which could be transferred to or vest in their trustees at the time of their insolvency. And upon this ground they decided against the claim of the trustees, and directed the whole amount of the three shares to be paid to Oliver's executors.

[* 260] * The ground upon which they supported the claim of Oliver's executors to these shares, is not stated fully in the opinion. It was, I presume, upon the ground that, by the terms of the award, the shares of these three persons were received by the trustees named in the award, in trust for these executors; and that the trustees, therefore, had no right to withhold it from them; as neither they nor their testator had any participation in the fraudulent contract out of which it had arisen. And if the court was right in deciding that neither the trustee of the insolvent nor any one else could derive a title to this money under the contract with Mina, perhaps the language of the award, together with the documents referred to in it, might justify this decision. But I express no opinion on this point, and merely suggest it in justice to the court of appeals, in order to show that their opinions in these cases are not necessarily inconsistent with each other, although the court may have reasoned erroneously, and decided incorrectly.

These decisions were brought to this court by the trustees of the insolvents, by writs of error, under the 25th section¹ of the act of

¹ 1 Stats. at Large, 85.

1789. Motions were made in each of them to dismiss for want of jurisdiction; and the motions were sustained by the majority of the court, and the cases dismissed, as will appear in the reports referred to.

I differed in opinion from the court; but undoubtedly, when the cases came before me at circuit, upon bills filed by the administrators, it was my duty to conform in the inferior court to the decision of the superior, as far as that decision applied to the case presented by these complainants. It is true that in my own opinion, and according to the views of the subject I had always entertained, these bills, by the administrators of the insolvents, could not be maintained. But I dismissed them, not only upon that ground, but also under the impression that I was bound to do so upon the principles upon which this court had decided them in the suits by the trustees. It appears, however, by the opinion just delivered, that I was mistaken, and placed an erroneous construction on the opinions formerly delivered. It seems, therefore, to be due to myself to state not only my opinion in the former cases, but also the interpretation I placed upon the language of this court in deciding them. And I think it will be found that the language of the former decisions was fairly susceptible of the construction I put upon it, although that construction has turned out to be erroneous. I do not mean to say that the construction which the majority of the court puts upon its former decisions now, is not the true one; but that the language used in it might lead even a careful inquirer to a contrary conclusion.

* I proceed, in the first place, to speak of the case of Gill, [* 261] trustee of Lyde Goodwin. As I have already said, when that case was before this court, I thought, and still think, we had jurisdiction; and proceed now to state the grounds of that opinion, and how it bore on the decision of the suit by his administrator, which is now before us.

The money in dispute was claimed under the contract with Mina. And the amount claimed was awarded to the Mexican Company, or their legal representatives or assigns, by the commissioners appointed under the Mexican treaty, and the act of congress¹ passed to carry it into execution. The commissioners were authorized to ascertain and determine upon the validity of the claims of American citizens upon the Mexican government, and for which this government had demanded reparation. Of course, it was their duty not to allow any claim for services rendered to Mexico, or money advanced for its use, by American citizens, in violation of their duty to their own country, or in disobedience to its laws. For the government would have been

¹ 5 Stats. at Large, 452.

unmindful of its own duty to the United States, if it had used its power and influence to enforce a claim of that description, or had sanctioned it by treaty. But the board of commissioners were necessarily the judges of the lawfulness of the contracts, and the validity of the claims presented. They were necessarily to determine whether they were of the description provided for in the treaty or not. They may have committed errors of judgment in this respect, and may have committed an error of judgment in sanctioning the contract with Mina. But the law under which they acted made them the exclusive judges on the subject. There was no appeal from their decision. And if there was no mal-practice on the part of the commissioners, and the award was not obtained by fraud and misrepresentation, it was final and conclusive. It was like the judgment of any other tribunal having jurisdiction of the subject-matter, and could not be reëxamined and impeached for error of judgment in any other court which had no appellate power over it. And they decided that the contract of Mina was valid, and, consequently, it vested from its date a lawful right to the money in the members of the Mexican Company.

The objection, therefore, in the Maryland court, brought into question the validity of an authority exercised under the United States; and as the decision of the state court was against its validity, it was my opinion that a writ of error did lie under the 25th section of the act of 1789. And regarding the award as final and conclusive upon other tribunals, there was error in the judgment of the state court, which pronounced it invalid and fraudulent. It will be ob-
[* 262] served that this error was the foundation * of the judgment of the state court: For, if the court did not look behind the award, and had regarded the contract as valid, the right to Goodwin's interest undoubtedly passed to his trustee in 1817, long before his assignment to Oliver. I therefore thought this court had jurisdiction, and that the judgment of the court of appeals ought to be reversed, and this money paid to the trustee, and not to Oliver's executors.

The majority of the court, however, entertained a different opinion, and dismissed the cases, upon the ground, as I understand the opinion, that the construction of the treaty, or of the act of congress, or the validity of the authority exercised under them, did not appear to have been drawn into question in the court of appeals; and that the case appeared to have been decided upon the effect and operation of their own insolvent law, and upon their own laws regulating contracts and transfers of property and credits within the State, over which we had no jurisdiction upon the writ of error; that these mat-

ters were exclusively for the decision of the state tribunals, and their decision final upon the subject.

Some remarks are made in the opinion in relation to grounds upon which the state court might have decided without impeaching the award of the commissioners; and, among others, the fact that Goodwin had assigned his right to Oliver in 1829, and that the Mexican congress had previously, in 1825, acknowledged its validity. There is an error in the date, but it is immaterial. The acts of the Mexican congress were in 1823 and 1824.

But I did not understand these remarks as intended to affirm that the share of Goodwin passed to Oliver by this assignment, but as suggesting grounds upon which the state court might, whether erroneously or not, have decided in favor of the executors. Because, as the court held that it had no jurisdiction in the case, I supposed that it intended to give no opinion upon the merits. And I presumed that it did not intend to decide that the acknowledgment of Mexico, that Mina's contract was binding upon the republic, could give any validity to it in the courts of the United States. For the contract of the Baltimore Company would have been liable to the same objections if it had been made originally, in 1816, with the Mexican government instead of General Mina. And if it was void in 1817, and Goodwin then had no interest under it, it was equally void in 1829, when the assignment to Oliver was made; and it is due to the court of appeals to say, that they have not indicated, in any of their opinions, that the acts of the Mexican congress had any influence on their judgments.

Upon these considerations, I dismissed the bill at circuit, upon two grounds: 1. My own opinion is, that the interest of Goodwin passed to his trustee, and, consequently, that the present complainant (his administrator) can have no title. 2. This court decided, upon a view of the whole case, that it had no appellate power over this judgment, and that it had been decided by the Maryland court upon its own construction of its own laws. And that point being adjudged by this court, I did not see upon what ground I could, in conformity to this opinion, revise the judgment of the state court and reverse its decision. It would, in substance, have been the exercise of an appellate power at circuit over the decisions of the state courts, upon their own laws, which this court had refused to exercise on writ of error; and, for the reason first above stated, I now concur in affirming the judgment here in the case of Goodwin's administrator.

I come now to the cases of the administrators of Gooding and Williams, which are, in many respects, alike. These writs were also

dismissed for want of jurisdiction, when formerly before the court; and in dismissing them, the court said that the title of the trustees to the shares of Gooding and Williams, "involved only a question of state law, and therefore was not the subject of revision here, and was conclusive of his rights, and decisive of the case." I quote the language of the court. The want of jurisdiction was, therefore, the only point decided in these cases, and they were dismissed on that ground.

It is true that in these cases, as well as in that of Goodwin's trustee, language is used, in the opinion of the court, which would seem to imply that the court was of opinion that the contract was void originally, but had afterwards become valid by the events referred to in the opinion. But I understood these observations, as I did those made in Goodwin's case, merely as suggesting considerations which might have led to the decision of the state court, without impeaching the award of the commissioners, but not as approving or sanctioning them as sufficient grounds for their decree. For the court determined that it had no jurisdiction, and consequently the merits of the case were not before it, and I presumed it did not mean to express any opinion concerning the correctness or incorrectness of the judgment of the state court. Such I have understood to be the established practice of this court, and I was not aware that this case was intended to be an exception. The only point decided was the conclusiveness of the judgment of the state court upon the rights of the trustees.

The court of appeals assigned two reasons for their decision, and taking them literally, as they stand, they are inconsistent with each other. But the opinion appears to have been hastily [* 264] * written, and not sufficiently guarded in its words; and it is evident they meant to say, that, in the opinion of the court, no interest vested in the trustee, because there was no legal or equitable interest acquired by the contract that could vest anywhere, or in any person. But, if there was a legal interest, it passed to his trustee, and, by his assignment, vested in Oliver. This mode of decision upon alternative grounds, is an ordinary and familiar one in courts of justice, and will often be found in the decisions of this court.

And however the reasoning of the state court may be regarded, it is clear that, with the interest of the intestate before them and under consideration, they decreed that the shares belonged to Oliver's executors. Now, it is perfectly immaterial whether the reasons assigned by the court were right or wrong. Here is their judgment, their decree—a decree founded altogether on state laws, as this court have said in their former decisions, and made by a court of competent jurisdiction. Upon what principle, then, can a court of the United

States, either at circuit or here, undertake to revise it or reverse it for error? If we had no appellate power upon the writ of error, and no right to reverse the judgment for errors supposed to be committed by the state court in interpreting and administering its own laws, how can this court or the circuit court exercise this revising power over the judgment in the form it now comes before us. It is doing in another way what it is admitted cannot be done in the prescribed mode of proceeding by writ of error. And I am not aware of any precedent for this exercise of power in a court of the United States administering state laws, when the judgment of the highest court of the State is before them upon the same case upon which the United States court is called on to decide.

It will be remembered that the appellate and revising power of the courts of the United States over the judgments of state courts, stands upon very different principles from those which, in England, govern the relation of superior and inferior tribunals, and they are not, therefore, always safe guides upon the revising and reversing power which the courts of the United States may constitutionally exercise over the judgments of state courts.

I know it is said that the administrators of these insolvents who have filed these bills were not parties to the former proceedings, and are not therefore estopped by the decree of the court of appeals. And a good deal of argument has been offered to maintain that proposition; but that question cannot arise until other questions which stand before it and control it are first disposed of. For this court held, upon the former writs of error, that these cases were decided by the court of appeals exclusively upon Maryland law; and, if that be the case, before we come *to the question of parties, other [* 265] questions must be decided: 1. Whether in this form of proceeding you can examine into the validity of the grounds upon which the state court decided them, and reverse its judgment if you suppose it committed an error in interpreting and administering its own laws; and, if you are authorized to do this, then, 2. Did it commit an error in deciding that those shares belonged to Oliver's executors? The reasons they may have given for this opinion are altogether immaterial; and if these two questions are decided in the affirmative, and this court reverses the judgment, upon the ground that the shares belonged to the insolvents at the times of their death, and not to Oliver's executors, then the administrators would undoubtedly have an interest, and are not estopped by the former decree from claiming their rights. Nobody, I presume, disputes this. But, before you come to this part of the case, you must take jurisdiction over the judgment of the state court, and reverse it for error. Because

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if that judgment stands, then the intestates had nothing at the times of their death that could pass to the administrators; and there would have been no more propriety in making them parties, than any other stranger who had no interest in the fund. The administrator of a vendor who has in his lifetime divested himself of all right to property, can hardly be supposed to be a necessary party in a controversy between purchasers under him, when neither of the claimants has a right to fall back for indemnity on his estate. The administrators offer no new evidence of interest in them or their intestates, but present here the identical case, in all its parts, that was before the court of appeals when it passed its decree.

Indeed, I cannot comprehend how the state court, or this court, can award the fund to the administrators, if the contract was fraudulent and void when the parties became insolvent. They both died before the award was made; but if, up to that time, the contract continued open to examination in a court of justice, and was decided to have been fraudulent and a nullity when made, nothing afterwards could have given it legal existence. *Nihilum ex nihilo oriatur* is as true in law as in philosophy. If void at first, it continued to be void and a nullity to the time of the deaths of the parties, and their administrators could derive no lawful title from them. To say that a legal or equitable interest in a fraudulent contract can exist in a party and be transmitted to his administrator, when used as legal language, is a solecism. And if from necessity, upon any principle of law or equity, the award related back, it would seem that those who purchased the interest in these shares, at their full market value at the time, and paid for it, should have the benefit of the relations.

[* 266] * It may be said, perhaps, that although the acts of congress of Mexico, in 1823 and 1824, could not make valid a contract originally void and a nullity by our laws, yet these acts of the Mexican legislature constituted a new and original contract which at that time might lawfully be made by our citizens, and that the rights of the parties take date from that contract. But this view of the case would not obviate the legal objections, but, on the contrary, it would add to them. For it still assumes the principle that the state court had a right to examine into the testimony, not only to determine the rights of the parties under the award, but to impeach the award itself. And upon this theory, if they had not found these acts of the Mexican congress in the proceedings of the commissioners, the state court might have held the whole award erroneous and a nullity, vesting no rights in any one, because it sanctioned an illegal contract. As I have already said, a state court, in my judgment, has no such power.

The commissioners do not refer to the Mexican acts of congress, nor allow the claims of the company upon a contract made by these laws. They award expressly upon the contract with Mina, and give interest according to that contract. And unless their award may be impeached for error, and their decision upon the claim reëxamined and reversed in the state court, the rights of all the claimants depend upon this contract, and take date from it. According to the award of the commissioners, it is this contract that gave the claimants rights, and which must consequently govern the court in distributing the fund.

It seems to be supposed that the decision of the court of appeals, declaring this contract to be fraudulent and void, was founded upon some local law of the State. But that is evidently a mistake. It was founded on the breach of the neutrality laws of the United States. They looked behind the award of the commissioners, behind an authority exercised under the United States, and impeached its validity.

Besides, no other contract but this was under examination in the state court. The court speak of no other in their opinion. The parties, as appear by the proceedings, all claimed under it, and the decisions of the court and the distribution of the fund were founded upon it. Can another and a subsequent contract be set up here, upon which the state court has passed no judgment, and has not acted, and under which none of the parties before it claimed? I think not. And if their decision is to be set aside for error, it must, I presume, be for error in deciding upon the contract brought before them by the parties. And if this court now reverse these decrees, upon the ground that the original contract with Mina was void, but became valid by subsequent * events, it reverses upon a [* 267] new case, upon which the state court has never decided. Moreover, it unsettles the whole proceedings in the state court, for the interest of the claimants, in almost every instance, depended upon the time that a lawful right to this claim vested in the company.

And if, notwithstanding these objections, this court may look into the judgment and reverse it for error, and they find it to have been decided upon two principles of law, consistent or inconsistent with each other, one of which is erroneous and the other sound, ought not the judgment to be affirmed?

Now, as I have already said, the state court committed an error, in my opinion, in going behind the award, and receiving testimony to show that a contract was fraudulent and void which a tribunal of the United States, having exclusive jurisdiction over the subject, had decided to be lawful and valid. And if this court have the power

to revise that judgment, I think it could not be supported on that ground.

But they put it upon another, and say, that if the original contract is regarded as valid, then the interest of the insolvents passed to their trustee, and, by virtue of his assignment, vested in Robert Oliver.

Now, in examining the judgment of an inferior tribunal in a case of this description, would the appellate court lay hold of the erroneous principle to reverse the judgment? Would they not affirm it upon the other alternative, which placed it upon lawful and tenable grounds? I think nobody would doubt that the judgment would be affirmed. Ought not the same rule to be applied to the Maryland judgment which this court is now revising? And is not this court bound, under the award of the commissioners, to regard the original contract as valid, when it has been so decided by a lawful tribunal of the United States, having exclusive jurisdiction over the subject? If we are so bound, and not authorized to impeach the judgment of the commissioners, then the judgment of the Maryland court, in the cases of Gooding and Williams, is right, and ought to be affirmed upon the second ground stated in the opinion, even if we were sitting here as an appellate tribunal.

It is true that the bill in the case of Williams's trustee was filed in the state chancery court, which, by a change of the law, represents the court where the fund was originally paid in and distributed among the claimants; and was removed to the circuit court of the United States by the appellees, who reside out of the State. And undoubtedly, the circuit court, in that state of the case, possessed the same power over it, and were bound to decide it upon the same principles that ought to have governed the state court in which the [* 268] bill was filed. But there * was no new evidence, no new fact, no new interest or equity presented. There is a new name, indeed, but no new interest or equity disclosed in the bill. And upon that case the court of appeals had passed its decree. That decree was the law of the case, in the inferior court, where this bill was filed. And the court of appeals itself could not reverse its decree, signed and enrolled at a former term, nor open it merely because a new name was before them, which, according to its former decree, had no interest in the fund, and consequently ought not to have been made a party in the former proceedings. And if we now reverse this judgment, we go further than the Maryland court of appeals could have gone, and exercise what is essentially an appellate power over it, correcting the errors of an inferior court.

But in Gooding's case this court go still further. The bill in this case was filed originally in the circuit court of the United States

Yet the fund was never in that court, nor the money paid to the appellees by its order. If the decree is to be opened for error, after the fund is distributed by order of a court of competent jurisdiction, ought it not to be done in the court that passed the decree? And can a circuit court of the United States compel the appellees to repay money which they hold under the decree of a court of coördinate jurisdiction, made upon the same case, with the same evidence before them? I think not.

Besides, Gooding became insolvent again in 1829. All the property, rights, and credits which he had at that time, vested in his trustees, who are still living. If Goodwin's interest in 1829 had become so far valid that it could pass by his assignment to Oliver, why is not Gooding's also lawful and vested in his trustees? Upon what principle can Goodwin's interest be capable of assignment in 1829, and Gooding's remain fraudulent until his death? Yet if it was capable of assignment in 1829, the complainant is not entitled. It passed to his trustees.

And if, as the court now say, Goodwin would be estopped from impeaching his assignment to Oliver on the ground that the original contract was illegal and fraudulent, why are not Gooding and Williams, and their administrators, equally estopped from impeaching their assignments to their respective trustee? The assignment to the trustee for the benefit of their creditors was equally meritorious with Goodwin's assignment to Oliver. And if they had appeared as parties in the Maryland court, would they have been permitted to impeach the title of the trustee, who was then claiming it, and set up a right to the money in themselves, upon the ground that the contract of their respective intestates was fraudulent? Certainly, the principle * is well established in chancery that a party [* 269] cannot set aside a contract upon the ground that he himself was guilty of a fraud in making it. I do not cite cases to prove familiar doctrines. His administrator is in no better condition. And yet he is allowed, in this case, to defeat the operation of the intestate's deed to the trustee, upon the ground that the contract, of which the trustee claims the benefit, was a fraudulent one on the part of his intestate. And here, in a court of equity, these administrators support their title and recover this money against their trustees, as well as Oliver's executors, solely upon the ground that their intestate was guilty of a fraud in making the contract with Mina, and incapable, therefore, of assigning it. The party defeats the operation of his own deed, upon the ground that he himself committed a fraud. This doctrine cannot, I think, be maintained, upon principle or authority, in a court of chancery.

We are not dealing with Mexican laws, or inquiring what a Mexican tribunal or the Mexican government would decide in relation to this contract, but we are inquiring how it stands in a Maryland court, and what are the legal rights under it by the laws of Maryland. And I understand this court to place its opinion solely upon the ground that this contract was fraudulent and void by the laws of Maryland, and that the parties acquired no rights under it.

It may have been good in Mexico; a valid, binding obligation. They may have been willing to reward our citizens for a breach of duty to their own country; but that could not cleanse it from the offence against our own law, nor give legal rights to the administrator, when there was no right in the intestate. The courts of the United States can hardly be authorized to sanction and enforce what are called honorary obligations of a foreign nation, when those obligations have arisen from temptations offered to our own citizens to violate the laws of their own country. Nor can I perceive how the opinion of the Maryland court, declaring this contract to be fraudulent and void, can be binding and conclusive upon this court, and yet every other decision of the same court, in the same case, explaining or qualifying this opinion, still be open to examination and reversed for error. I cannot, for myself, draw any line of distinction between the relative conclusiveness of the opinions the state court expressed, when all of them were equally within its jurisdiction and depended altogether upon the laws of the State; and all upon points necessarily arising in the case they are then deciding.

When these two cases were before the court, upon writs of error brought by the trustees, I entertained the opinions I now express. I then thought that the court had jurisdiction, upon [* 270] * the ground that the validity of the act of the Maryland legislature of 1841, confirming a certain description of conveyances made before that time by the trustees of insolvent debtors, was drawn into question, as contrary to the constitution of the United States, and their decision had been in favor of the validity of the state law. And I still think so. But at the same time I was of opinion that the law in question was valid, and that, although we had jurisdiction, the judgment of the state court in these two cases ought to be affirmed, and the writs of error not dismissed. For the trustee in whom the shares vested, according to the opinion I have expressed as to Goodwin's case, had transferred them to Oliver, and the state court was, therefore, right in decreeing them to Oliver's executors. The majority of this court thought otherwise, and dismissed them for want of jurisdiction. And I did not state my dissent, because, as I then understood the opinion, the dismissal finally disposed of them.

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It was upon the grounds above stated that I decided these cases at the circuit, and supposed, at the time, I was deciding them in conformity to the opinion of this court upon the conclusiveness of the judgment of the state court. The judgment just pronounced, however, shows that so far as the shares of Gooding and Williams are concerned, I misunderstood the opinion of the majority of this court. But with all the habitual respect which I feel for the judgment of my brethren, the opinion I held at the circuit remains unchanged. And I have the more confidence in it, because this court, now, as heretofore, have said that the questions in dispute depend altogether on Maryland law; and every judge in Maryland who has been called upon to hear and decide the cases of Gooding and Williams, of which I am now speaking; the judge of the court of original chancery jurisdiction, the judges of the court of appeals, all men of high legal attainments and eminence, have clearly and unanimously held, upon the same proofs now before us, that the executors of Oliver were entitled to these two shares in the Mexican Company, and decreed that the money should be paid to them. And no one of these judges deemed it necessary that the administrators should be parties, or called before the court; acting no doubt upon the established rules of chancery, that a person who has no interest in the fund need not and ought not to be made a party; and that the administrators could have no interest, as the intestates themselves had none at the times of their respective deaths. And that if they were before the court, they could not be allowed to impeach the deed to the trustees by alleging that their intestate had committed a fraud in making it.

I must, therefore, adhere to the opinions I entertained when the cases were before me at circuit, and dissent from the *opinion just pronounced, in the cases of Gooding's and [*271] Williams's administrators, and concurring in that of Goodwin's administrator, for the reasons hereinbefore stated.

John S. Williams, administrator of James
Williams, deceased, appellant,

v.

Robert M. Gibbes and Charles Oliver, ex-
ecutors of Robert Oliver, deceased.

and

John Gooding, Jr., administrator *de bonis
non* of John Gooding, deceased, appel-
lant,

v.

Robert M. Gibbes and Charles Oliver, ex-
ecutors of Robert Oliver, deceased.

Appeals from the circuit
court of the United
States for the district
of Maryland.

DANIEL, J., dissenting.

When at a former term, these cases were brought before this court, in the name of Nathaniel Williams, trustee for the creditors of James Williams, an insolvent debtor, and of the same Nathaniel Williams, as trustee for the creditors of John Gooding, an insolvent debtor, the court, after argument, and upon full consideration, dismissed them for the want of jurisdiction. The decision of the court then pronounced, commanded my entire concurrence. I still concur in that decision, and hold the reasons on which it was founded as wholly impregnable. Those reasons were specifically these: That the questions involved in the cases were purely questions arising upon the construction of the insolvent laws of Maryland; questions properly determinable, and which had been determined by the highest tribunal of that State; and such, therefore, as vested no jurisdiction in this court.

Such, then, being directly and explicitly the decision of this court, as will be seen in the report of its decision in 12 How. 111, 125, it becomes a matter for curious speculation to inquire by what view of the facts and the law of these cases, by what process of reasoning upon the same facts and the same law, this court have now arrived at a conclusion diametrically opposed to that which had been formerly reached by them. The parties in interest are essentially the same, varied only in name; it is the same insolvent law of Maryland which it is now, as it formerly was, undertaken to interpret; and it is the identical exposition of the identical court, formerly examined and sanctioned here, which this tribunal now assumes the right to reject and condemn.

[*272] *Indeed, the field for discussion and criticism is now much more narrow than was that which existed when these cases were formerly before this court. At that time there were strenuously urged grounds for contestation, founded upon an alleged construction of the Mexican treaty, and of the acts of the commissioners under that treaty. At present, the claims of the appellants, and the impeachment by them of the decision of the state court, and of that of the circuit court of the United States, have been rested chiefly, if not exclusively, upon the fact, that the personal representatives of the insolvent assignors were not made parties to the suits brought for the distribution of the effects of the insolvents.

It cannot be correctly insisted on as a universal or necessary rule, that in suits by assignees the assignors from whom they derive title, must be made parties. Cases may occur in which there may be a propriety of joining the assignors in such suits, but, without some apparent cause for such a proceeding, the rule and the practice are otherwise. Indeed, the calling into a controversy or litigation a per-

son who can have no interest in such litigation, would be discountenanced by the courts, who would dismiss him from before them at the costs of the person who should have attempted such an irregularity. And it would seem that, if there could be a case in which such an attempt would be irregular, it would be that in which the person so made a party, had not, and could not have, any interest in the controversy; in other words, should be an insolvent, who had transferred upon record every possible interest he possessed in the matter in controversy. But suppose it be admitted as the general rule, that an assignee should, in the prosecution of an assigned interest, call in his assignor as a voucher, or for any other purpose, how will these cases be affected by such an admission?

The absence of the personal representatives of the insolvent assignors is the only circumstance imparting a shade or semblance of difference between the attitude of these cases as formerly brought before us, and that in which they are now presented. Of what importance, either now or formerly, could be the presence or absence of the personal representatives of these insolvents, it might puzzle Œdipus himself to divine. The rights or interests of the representative can never be broader than are those of the person represented; and as the persons represented in these cases are admitted on all sides, and are shown upon record, to have nothing, by reason of the transfer to their trustees of all that they had ever possessed, or to which they had any claim,—and that, too, by a mode of transfer which declared the inadequacy of their all for the *liquidation of [*273] their debts,—it followed, that those who came forward under these insolvents, *jure representationis*, merely, could themselves be entitled to nothing, by representation, from their principals, nor claim any thing in opposition to the universal and absolute assignments to the trustees of those debtors.

Had these personal representatives of the insolvents been made parties to the suits for distribution, it is probable that they would have been regarded by the court as mere men of straw, used for the purpose of depriving the purchasers, for valuable consideration, from the trustees or assignees of the insolvent's interests, deemed, at the time of the sale by the trustees, precarious and contingent, but which the progress of events had subsequently rendered available.

But whatever may be admitted as the general rule applicable to suits by an assignee; however that rule may be supposed to require that in such suits the assignor, or his representative, should be a party, still, we are brought back to the true character of these cases, and of the rule of law peculiarly applicable to them, namely, that they are controversies depending upon the construction of the statutes

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of Maryland, which regulate the administration of the effects of insolvent debtors. That, in the construction of those statutes, it has been, by the supreme court of the State, decided, that in suits by the purchasers or assignees from the statutory trustees of insolvent debtors, the personal representatives of those insolvent debtors are not necessarily to be made parties, but that such suits may be prosecuted and decided without participation or interference on the part of such representatives; that in conformity with this construction of the statute of Maryland, by the supreme court of the State, the circuit court of the United States for the district of Maryland, and this court, in the cases herein mentioned, have concurrently ruled in direct opposition to the pretensions of the appellants now advanced.

Regarding the decision just pronounced as in conflict with all that has been heretofore ruled upon the subjects of this controversy, and as transcending the just authority of this court to reject the construction of the statute of Maryland, proclaimed by the supreme court of that State, I am constrained to declare my dissent from the decision of this court, and my opinion that the decrees of the circuit court, in these cases, should be affirmed.

17 H. 274; 20 H. 585.

JOHN GOODING, JR., Administrator *de bonis non* of JOHN GOODING, deceased, Appellant, v. CHARLES OLIVER and ROBERT M. GIBBES, Executors of ROBERT OLIVER, deceased.

17 H. 274.

NELSON, J., delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of Maryland.

The case involves the same questions, and is in all respects the same, as the case of the administrator of Williams against the executors of Oliver, just decided.

The decree of the court below is therefore reversed, and the case remanded to the court below.

Taney, C. J., McLean, J., and Daniel, J., dissented.

[*275] *For the opinions of Mr. Chief Justice Taney, and Mr. Justice Daniel, see the preceding case of Williams, administrator of Williams v. Gibbes and Oliver, executors of Robert Oliver, deceased.

24 H. 817.

In the Matter of JOSIAH S. STAFFORD and JEANNETTE KIRKLAND, his
Wife, Appellants, v. THE UNION BANK OF LOUISIANA.

17 H. 275.

To supersede the execution of a decree for the foreclosure of a mortgage, the mortgagor must give security for the whole amount decreed to be due; and where he failed to do so, and the court below refused to execute the decree, a peremptory *mandamus* was awarded. The decision in 16 How. 135, affirmed.

THE case is stated in the opinion of the court. See also 16 How. 135.

Coxe, for the relator.

R. Hughes, contra.

M'LEAN, J., delivered the opinion of the court. [*279]

This is an appeal in chancery from the district court of Texas.

A motion is made by the counsel for the appellees, to dismiss the appeal, because the defendants have filed no sufficient bond.

Also, that a rule on the district judge, to show cause why a peremptory *mandamus* should not be issued, granted at the last term, be made absolute.

At the last term, a motion was made to dismiss this cause, and to award a *procedendo*, on the ground that the appeal bond was insufficient.

On consideration of that motion, the court held, that the bond for \$10,000, given on the appeal from a decree for the payment of \$65,000, was insufficient, as the act of congress requires a bond in the amount of a judgment or decree, to prosecute the appeal or writ of error with effect.

But the court overruled the motion to dismiss the appeal and award a *procedendo*, for the reason that, from the time the appeal was taken, the appellant was not bound, under the acts of congress and the rules of court, to enter the appeal on the docket of this court, before the present term.

During the same term, on motion, a rule was ordered on the district judge to show cause, at the present term, why a *mandamus* should not be issued, commanding him to cause the decree entered by the said district judge, on the 25th February, 1854, between the above parties, to be carried into execution according to the terms thereof.

In answer to the rule the judge states, that having taken what he

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considered to be good and sufficient security, as the law required, the cause was appealed to the supreme court, which removed it from his jurisdiction, and that he had no power to make an order in the case.

It was the duty of the judge, in allowing the appeal, to take security on the appeal in the sum decreed; and not having done so, the appellant was not entitled to a *supersedeas* of any process necessary to carry the decree into effect; and the judge was [* 280] *bound to issue it, on the application of the plaintiff. The court, therefore, order that a peremptory *mandamus* issue, commanding the judge forthwith to carry the decree into effect.

But as the security given was sufficient to bring the cause before the court by appeal, though not sufficient to suspend the execution of the same, the court overruled the motion to dismiss the appeal.

17 H. 288; 7 Wal. 864.

In the Matter of JOSIAH S. STAFFORD and JEANNETTE KIRKLAND, his Wife, Appellants, v. THE NEW ORLEANS CANAL AND BANKING COMPANY.

17 H. 283.

The decision in the preceding case of Stafford and Wife v. The Union Bank of Louisiana, again affirmed.

[* 283] *M'LEAN, J., delivered the opinion of the court.

This appeal is subject, in principle, to the objections stated in the above case of Stafford and Wife v. The Union Bank of Louisiana; and, for the reasons stated in that case, a peremptory *mandamus* is ordered in this one, to carry into effect the decree entered in the district court. The motion to dismiss this appeal is overruled.

THE UNITED STATES, at Relation of AARON GOODRICH, Plaintiff in Error, v. JAMES GUTHRIE, Secretary of the Treasury.

17 H. 284.

A writ of *mandamus* should not be issued to the secretary of the treasury, commanding him to pay to a judge of a territory his salary for the unexpired term of the office from which he had been removed by the President, and another person appointed thereto.

THE case is stated in the opinion of the court.

Lawrence, for the relator.

Cushing, (attorney-general,) *contra*.

*DANIEL, J., delivered the opinion of himself, the chief [* 301] justice, and justices Wayne and Catron.

This case comes before us upon a writ of error to the circuit court of the United States for the District of Columbia and county of Washington. It originated in the denial, by the court above mentioned, of a writ of *mandamus*, by which the secretary of the treasury should be ordered to pay to the relator a sum of money claimed by the latter as a portion of the salary due to him as chief justice of the territory of Minnesota.

The facts which constituted the grounds of the application, few and simple in their character, were these : —

That on the 19th of March, 1849, the relator had, with the advice and consent of the senate, been commissioned, by President Taylor, chief justice of the supreme court of the territory of Minnesota, to which office there had been annexed (by the act of congress¹ organizing the territorial government) a compensation or salary of eighteen hundred dollars per annum, payable quarter-yearly. That the tenure of the appointment was, by the language both of the act of congress, and of the commission of the relator, declared to be for the term and duration of four years from the date of the commission. That the relator, having accepted his commission was, afterwards, namely, on 22d of October, 1851, informed by J. J. Crittenden, acting secretary of state, that the President had thought it proper to remove him from office, and to substitute in his place Jerome Fuller.

That the relator, insisting upon the tenure of his office according to the literal terms of the commission, preferred a claim *before the first auditor of the treasury for the sum of [* 302] \$2,343, as compensation, from the period of his dismissal, up to the expiration of four years from the date of his appointment.

That the first auditor having rejected the claim in these words : “ That Aaron Goodrich is not entitled to the salary claimed by him,” an appeal was taken by the relator to the comptroller of the treasury, by whom the decision of the first auditor was sustained, and by whom, in adjudging, it is remarked, that “ There can be only one chief justice of the supreme court in the territory ; and the President of the United States having thought proper to remove Chief Justice Goodrich, and having nominated, and, by and with the consent of the senate, appointed Jerome Fuller chief justice, in the room and stead of the said Chief Justice Goodrich, he, that is, the comptroller, was bound to consider the said removal and appointment as legal.” And in consideration of the facts and the law, his decision was, that the United States were not indebted to the said Aaron Goodrich,

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as chief justice of the supreme court of the territory of Minnesota, and that the decision of the first auditor in the premises was confirmed and established.

Upon the foundation of the facts above recited, and in opposition to the decisions of the auditor and comptroller, and with the view of coercing the allowance, by the secretary of the treasury, of the claim preferred by the relator, the application, which has been refused by the circuit court, was made.

In considering this case, it may be remarked, at the threshold, that it exhibits the anomalous predicament of a prosecution by and in the name of the United States, adversary to the United States and to their authority; for it must be admitted that the secretary of the treasury can have no relation whatever, and is clothed with no powers, and sustains no obligation incident to the present controversy, except as he is the representative of the United States, or the guardian or custodian of their interests, committed to his charge.

In their discussion of this cause, the counsel on either side have deemed themselves called upon to take a more extensive range of inquiry, than is that by which we consider this controversy to be properly limited. They have supposed that, in the regular line of this controversy, and therefore, in its correct adjudication, were involved, necessarily, the tenure and character of the judicial power, as created either by the constitution or by the legislation of congress; as likewise the powers of the executive department, in the exercise of its constitutional functions, to control or influence the judicial power; and in their examination, by the counsel, of these [* 303] deeply-important topics, *much of research and ingenuity has been evinced. But, within what we conceive to be the correct apprehension of this cause, neither of those important topics is embraced; and although, when regularly and directly presented for consideration, the responsibility of passing upon them can no more be avoided than can the adjudication of any minor subject of judicial cognizance, yet their very importance furnishes a cogent reason why any unauthorized proceeding, in reference to them, should be cautiously avoided; why there should be no attempt to affect them by proceedings extrajudicial in their character, and such as would deprive of binding authority the action of the court, in matters even of trivial concernment.

The true question presented for our consideration here, relates neither to the tenure of the judicial office, as created and defined by the constitution or by acts of congress, nor to the powers and functions of the President, as vested with the executive power of the government.

The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the federal government, or by any known principle of law, there can be asserted a power in the circuit court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations — nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *à priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the constitution and laws, and guided by the modes therein prescribed, but by the uncertain, and perhaps contradictory action of the courts, in the enforcement of their views of private interests.

But the question proper for consideration here has not been left for its solution upon theoretical reasoning merely. It has already been authoritatively determined.

The power of the courts of the United States to command *the performance of any duty, by either of the prin- [* 304] cipal executive departments, or such as is incumbent upon any executive officer of the government, has been strongly contested in this court; and, in so far as that power may be supposed to have been conceded, the concession has been restricted by qualifications, which would seem to limit it to acts or proceedings by the officer, not implied in the several and inherent functions or duties incident to his office; acts of a character rather extraneous, and required of the individual rather than of the functionary.

Thus it has been ruled, that the only acts to which the power of the courts, by *mandamus*, extends, are such as are purely ministerial, and with regard to which nothing like judgment or discretion, in the performance of his duties, is left to the officer; but that, wherever the right of judgment or decision exists in him, it is he, and not the courts, who can regulate its exercise.

These are the doctrines expressly ruled by this court, in the case

of *Kendall v. Stockton*, 12 Pet. 524; in that of *Decatur v. Paulding*, 14 Pet. 497; and in the more recent case of *Brashear v. Mason*, 6 How. 92; principles regarded as fundamental and essential, and apart from which the administration of the government would be impracticable. These principles, just stated, are clearly conclusive upon the case before us. The secretary of the treasury is inhibited from directing the payment of moneys not specifically appropriated by law. Claims against the treasury of the United States, like the present, are, according to the organization of that department, to be examined by the first auditor; from this officer they pass, either under his approval or by appeal from him, to the comptroller; and from the latter they are carried before the secretary of the treasury, without whose approbation they cannot be paid, and who cannot, even by the concurring opinions of the inferior officers of the department, be deprived of his own judgment upon the justice or legality of demands upon public money confided to his care. Opposed to the claim under consideration, we have the decisions of three different functionaries; to each of whom has been assigned, by law, the power and the duty of judging of its justice and legality. By what process of reasoning, then, the authority to make those decisions, or those decisions themselves, can be reconciled or identified with the performance of acts merely ministerial, we are unable to conceive; and unless so identified, or there could have been shown some power in the circuit court competent to the repealing of the legislation by congress, in the organization of the treasury department—competent, too, to [* 305] the annulling of the explicit rulings of this *court, in the cases hereinbefore cited—the circuit court could have no jurisdiction to entertain the application for a writ of *mandamus* in this instance. As no such power has been shown, nor, in our opinion, could have been shown, or ever had existence, the decision of the circuit court, overruling the application, is approved and affirmed.

M'Lean, J., dissented. Curtis, J., filed a separate opinion; in which Nelson, J., Grier, J., and Campbell, J., concurred.

CURTIS, J. I assent to the judgment of the court in this case, upon the ground that a writ of *mandamus* to the secretary of the treasury is not a legal remedy, to try the title of the relator to the office claimed by him; and that, until that title has been legally tried and determined, he can take no step to compel the payment of the salary attached by law to that office. I desire to be understood as expressing no opinion upon any other question argued by the counsel in this case.

Nelson, J., Grier, J., and Campbell, J., concurred in this opinion.

M'LEAN, J. As this case involves important principles, and as I differ from the opinion of the court, I shall state my views.

The first inquiry that naturally arises in the case is, whether the President had power to make the removal complained of? This is not the object of the *mandamus* applied for, but it is incidental to it.

The 2d section of the 2d article of the constitution provides: "That the President shall have power, by and with the advice and consent of the senate, to appoint ambassadors, other public ministers and consuls, judges of the supreme court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

In his argument, the attorney-general says: "That the power of the President was discussed and settled by congress, in the commencement of the federal government; that the power of the President to remove all officers, who, by the constitution itself, were not declared to hold their offices during good behavior, was sustained by both houses; and that this power was recognized in the establishment of the department for foreign affairs."

* In the 2d section of the act referred to, it is provided: [* 306] When the principal officer of the department should be removed, the chief clerk, during the vacancy, shall have custody of the records of the department. And a similar provision is contained in the other acts to establish the principal departments of the government. The heads of these departments constituted the cabinet of the President; and, as they were not only his advisers, but discharged their duties under his direction, there was a peculiar propriety that their offices should be held at the will of the executive.

There was great contrariety of opinion in congress on this power. With the experience we now have, in regard to its exercise, there is great doubt whether the most enlightened statesmen would not come to a different conclusion.

The attorney-general calls this a constitutional power. There is no such power given in the constitution. It is presumed to be in the President, from the power of appointment. This presumption, I think, is unwise and illogical. The reasoning is: the President and senate appoint to office; therefore, the President may remove from office. Now, the argument would be legitimate, if the power to remove were inferred to be the same that appoints.

It was supposed that the exercise of this power by the President, was necessary for the efficient discharge of executive duties. That to

consult the senate in making removals, the same as in making appointments, would be too tardy for the correction of abuses. By a temporary appointment, the public service is now provided for in case of death, and the same provision could be made where immediate removals are necessary. The senate, when called to fill the vacancy, would pass upon the demerits of the late incumbent.

This, I have never doubted, was the true construction of the constitution, and I am able to say it was the opinion of the late supreme court, with Marshall at its head.

The numbers of *The Federalist*, though written before the constitution was adopted, have been considered as among its ablest expositors. Publius, in one of his numbers, says : " It has been mentioned as one of the advantages to be expected from the coöperation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as appoint. A change of the chief magistrate, therefore, would not occasion so violent or so great a revolution in the offices of the government, as might be expected if he were the sole disposer of offices ; where a man in any station has given satisfactory evidence of his fitness for it, a new President [* 307] would be restrained * from attempting a change in favor of a person more agreeable to him, by the apprehension that the discountenance of the senate might frustrate the attempt and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration, will be most disposed to prize a provision which connects the official existence of public men, with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability less subject to inconstancy than any other member of the body."

In this discussion, in congress, Mr. Madison, one of the ablest and most enlightened statesmen of which our country can boast, considered the removal from office was an executive power, and that congress could not restrict its exercise. He also considered the power of appointment an executive power, and that, had not the constitution so provided, the concurrent action of the senate could not have been required by act of congress in making appointments. If this were admitted, it would not give strength to the argument in favor of the exercise of the power by the President.

If the power to remove from office be inferred from the power to appoint, both the elements of the appointing power are necessarily included. The constitution has declared what shall be the executive power to appoint, and by consequence, the same power should be exercised in a removal. But this power of removal has been, per-

haps, too long established and exercised to be now questioned. The voluntary action of the senate and the President, would be necessary to change the practice ; and as this would require the relinquishment of a power by one of the parties, to be exercised in conjunction with the other, it can scarcely be expected.

The attorney-general says, that "the construction of the constitution concurred in by the two houses of the first congress, and approved by President Washington, resolved, among others, the following point : —

"That in a republican government, public offices are created for the benefit of the people ; that the officer does not hold a private estate and property in the office, and when the officer is unfit, for any cause whatever, he ought to be displaced, and another appointed for the benefit of the people and their security ; or if the office itself be found, upon experience, to be unnecessary, it should be abolished." The soundness of the policy expressed in this resolution, must be admitted by every intelligent individual who understands and appreciates our system of government ; and if the power had been exercised under the limitations expressed in the resolution, it would have had a * most salutary effect on office holders, and on [* 308] the public. For the truth of this a reference may be made to the history of the earlier administrations.

But this power of removal from office by the President, was neither exercised nor supposed to apply until recently, to the judicial office.

In the establishment of the territories, the "Northwestern," "Indiana," "Illinois," "Mississippi," "Michigan," and "Wisconsin," it was provided that the judges should hold their offices during good behavior. The governor, secretary, and the other officers of these territories were appointed, under the law, for a term of years, "unless sooner removed."

By the act of congress of August, 1789,¹ to provide for the government of these territories, certain changes were made in the ordinance of 1787, to adapt it to the constitution of the United States. It was provided that the President shall nominate, and by and with the advice and consent of the senate, shall appoint, all officers which by the said ordinance were to have been appointed by the United States in congress assembled ; and all officers so appointed shall be commissioned by him ; and all cases where the United States, "in congress assembled, might, by the said ordinance, revoke any commission or remove from any office, the President is hereby declared to have the same power of revocation and removal."

¹ 1 Stats. at Large, 50.

In the territories of "New Orleans,"¹ "Florida,"² "Iowa,"³ "Oregon,"⁴ "Washington,"⁵ "Utah,"⁶ "New Mexico,"⁷ "Minnesota,"⁸ "Nebraska,"⁹ and "Kansas,"¹⁰ the judges were appointed for four years; and the governor and all other officers of the territories were appointed for a term of years, "unless sooner removed."

In the "Missouri"¹¹ and "Arkansas"¹² territories only, were the judges appointed for four years, "if not sooner removed."

In the constitution, no express provision was made for the government of territories. This, no doubt, was deemed unnecessary, as the ordinance of 1787, which was passed before the constitution was adopted, provided for the government of all the territory then claimed by the United States.

Territorial judges are said not to be appointed under the constitution, but by virtue of an act of congress. In *The American Insurance Company v. Canter*, 1 Pet. 546, Chief Justice Marshall said: "The judges of the superior courts of Florida held their offices for four years. These courts, then, are not constitutional courts, in which the judicial power, conferred by the constitution on the general government, can be deposited." But all the judges of the territories, from 1787 to 1804, were appointed for good behavior, so that the term of service was not a safe criterion by which to determine the character of territorial judges.

[* 309] * It is admitted that the judges of the supreme court cannot be appointed for a less period than good behavior; and the same may be said of the district judges.

The power under which the territorial governments is organized is a matter of some controversy. In the case above cited, Chief Justice Marshall said: "Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress to make all needful rules and regulations respecting the territory or other property belonging to the United States." This is the prevailing view of those who have examined the subject. But the chief justice proceeds: "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. These facts exist in every territorial government, but it does not show the source of the power, unless by the doctrine of necessity, which does not seem to be a legitimate foundation for a civil government under our system." The chief justice further says: "The right

¹ 2 Stats. at Large, 284. ² 3 Ib. 657. ³ 5 Ib. 237. ⁴ 9 Ib. 326. ⁵ 10 Ib. 175. ⁶ 9 Ib. 455
Ib. 449. ⁸ Ib. 406. ⁹ 10 Ib. 280. ¹⁰ Ib. ¹¹ 2 Ib. 746. ¹² 3 Ib. 495.

to govern may be the inevitable consequence of the right to acquire territory." There is no special power given in the constitution to acquire territory. This does not seem to have been within the view of the framers of the government; and the right was much contested in the acquisition of Louisiana, when the power was first exercised.

It seems to me that the power to govern a territory is a necessary consequence of the power given "to make all needful rules and regulations respecting the territory or other property belonging to the United States." No one doubts the power of congress to sell the public lands beyond the limits of any State; and this renders necessary the organization of a government for the protection of the persons and property of the purchasers. This is an implied power, but it necessarily results from the power to sell the public lands.

It is difficult to say that any power can be exercised by congress, which is not derived from the constitution. Without that instrument, it is as powerless as any other association of men. The laws of the Union protect our commerce wherever the flag of the country may float, and, in some instances, our own citizens may be made responsible for acts done in foreign seas and countries; but this is the exercise of powers given by the constitution. Under the legislative power of congress, territorial governments are organized, and their functionaries are appointed by the President and senate. Their laws emanate from congress, or are passed by a territorial legislature, subject * to the approval of congress. The government of the [* 310] territory is a government of the United States; and although its courts do not exercise the judicial power to the same extent as the other courts of the United States, still, they are courts of the United States, and exercise such judicial powers as are conferred on them by law.

It is argued that, as the President is bound to see the laws faithfully executed, the power to remove unfaithful or incompetent officers is necessary. This may be admitted to be a legitimate argument, as commonly applied to executive officers. My own view is, that the power to see that the laws are faithfully executed, applies chiefly to the giving effect to the decisions of the courts when resisted by physical force. But, however strongly this may refer to the political officers of the government, how can it apply to the judicial office?

In the nature of his office, the President must superintend the executive department of the government. But the judiciary constitutes a coördinate branch of the government, over which the President has no superintendence, and can exercise no control. So far from this department being subject to the executive, it may be called to pass on the legality of his acts. The President, like all the other

officers of the government, is subject to the law, and cannot violate it with impunity. He is responsible for the infraction of private rights, and before a territorial court, the same as before the other courts of the Union. In no just and proper sense can the President be required to see that the judicial power shall be carried out, except as controlling the physical power of the Union.

The effects of the control of the judicial, by the executive power, are seen in the history of England, during the reign of the Stuarts. The most insupportable tyranny and corruption were realized under this paramount power of the executive government. It has always been the corrupting power of all free government. This, in a great degree, arises from the extent of its powers and patronage. And in the formation of our government, great care was taken to place the judicial power on an independent basis. Being without patronage, and discharging the most onerous and delicate duties, nothing but a high and an impartial discharge of its functions can sustain it.

Whenever any portion of the judicial power shall become subject to the executive, there will be an end of its independence and purity. It will become the register of executive decrees and of a party policy. What could create a deeper degradation than to see any branch of the judiciary, which stands between the executive power and the rights of the citizen, become the mere instrument of that power.

[*311] * There can be little or no difficulty in coming to a correct conclusion on this important question, by an examination of the acts of congress creating the tenure of the judicial office in the territories. In the seven territories first enumerated, the judges were appointed during good behavior; the other officers were appointed for a term of years, "if not sooner removed."

In ten territories the law authorized the appointment of judges for the term of four years, and the other officers for a term of years, "if not sooner removed." Whether, in the above acts, the judicial tenure was fixed for good behavior or a term of years, no one can fail to see the difference in regard to the tenure of the judges, and of the other officers. The judges were appointed absolutely for good behavior, or a term of years, whilst the other officers were appointed for a term of years, "unless sooner removed." By the terms of the appointment, the political officers, such as the governor, secretary, marshal, &c., were removable, but the judges were not. In this respect these appointments stand in contrast, and show the unmistakable intention of congress.

It is true that for the territories of Missouri, and Arkansas, the judges were appointed for the term of four years, "unless sooner removed." This language was first used for the Missouri territory,

and as the Arkansas territory was taken from Missouri, the same language was incorporated into the organic law of Arkansas. These two territories, out of the nineteen above named, would imply the power to remove the judges. But whether this language was the result of accident or design, it cannot authorize the construction of the law establishing the other territories, among which the territory of Minnesota is included, as though the power of removal applied to them. The words used will not allow this construction, especially when taken in connection with the words in the same acts in relation to the appointment of officers in the territories, other than the judges.

This view is greatly strengthened by the usage of the government. There have been, it is believed, but two judges of territories removed, and those recently, since the organization of the Union. And we may rely on the early practice of the government, to show its true theory, in the exercise of federal powers. The great principles of our system were then understood and adhered to, and our safest axioms are found in this part of our history.

It is said, the act of 1789, which modified the ordinance of 1787, so as to adapt it to the constitution, gave the same power to the President, in regard to appointments and removals, which, under the confederation, was exercised by congress. This is true; * but it can apply only to those officers which, under the [* 312] confederation, were removable by congress. Under the ordinance, as above stated, the judges were appointed during good behavior, while all the other officers were appointed for a term of years, "unless sooner removed."

If congress have the power to create the territorial courts, of which no one doubts, it has the power to fix the tenure of office. This being done, the President has no more power to remove a territorial judge, than he has to repeal a law. The duties of a judge of a territory are discharged as independently, and as free from executive control, as are the duties of a judge of this court. This territorial judicial power was intended to be a check upon the executive power. And it would be inconsistent with the principles of our government, for the judges to be subject to removal by the executive.

This is a great question, although it can only effect, as now maintained, the territorial bench. And I regret that, from the want of jurisdiction, in the opinion of my brethren, they are not required to express an opinion as to the power asserted.

The other question in the case is, whether the remedy by *mandamus* is appropriate and legal. In the case of *Kendall v. The United States*, 12 Pet. 608, which, in my judgment, is not distinguishable from this, the question was settled.

In that case, under a special act of congress, a matter of controversy between William B. Stokes *et al.* and the postmaster-general, was referred to a commissioner, to examine the account, and report any balance he might find due to the relators, from the post-office department; and the postmaster-general was required to pay such balance, by entering a credit on the books of the department.

The duties of the commissioner were performed, and he reported in favor of the relators, \$161,563.89, all of which sum was credited by the postmaster-general, except the sum of \$39,462.43, which he refused to place to the credit of the relators, on the books of the department. The petitioners prayed the circuit court of the District of Columbia to award a *mandamus*, directed to the postmaster-general, commanding him to enter the credit.

A peremptory *mandamus* was issued by the circuit court, which decision was brought before this court by a writ of error. All the members of this court held, that it was a proper case for *mandamus*, as the duty imposed was ministerial and positive, there being no other adequate remedy. Three only of the judges dissented, on the ground that the circuit court of the District of Columbia had not power to issue the writ; but the other six judges held, that it was not only a case for a *mandamus*, but that the circuit court had the power to issue it.

[* 313] * The credit was required to be entered on the books of the auditor of the post-office department, whose duties were performed under the treasury department. But as the accounts were examined in the post-office department, the credit was required to be entered by the postmaster-general on the books of the auditor. It was known that an order of the postmaster-general, requiring the credit to be entered, would be obeyed by the auditor.

In the case before us, the salary of the judge was fixed by law, and payable at the treasury department, where application for payment has been frequently made by the relator, and refused by the secretary of the treasury. It is shown that an appropriation of the salary was made by act of congress, and in such a case the payment is a ministerial act, and the secretary has no discretion to withhold it. This would not be controverted, it is supposed, if the judge, who demanded payment, had remained in office. If, in such case, the secretary may, at his discretion, refuse to pay the salaries of officers, he might suspend the action of the government. The duty to pay is enjoined on the secretary by law; it is a ministerial duty, in which he can exercise no discretion, the appropriation having been made by law.

By the act of 2d September, 1789,¹ the secretary of the treas-

¹ 1 Stats. at Large, 65.

ury is required to "grant all warrants for moneys to be issued from the treasury in pursuance of appropriations by law." And, in the same act, the treasurer is required to "receive and keep the moneys of the United States, and to disburse the same upon warrants drawn by the secretary of the treasury, countersigned by the comptroller, recorded by the register, and not otherwise." These are all ministerial duties performed under the secretary of the treasury. The money having been appropriated by law for the salary of the judge, the secretary was bound to pay it.

The justification for the non-payment by the secretary is, that the relator had been removed from office by the President, and that, by the President and senate, his successor had been appointed, who, having entered upon the discharge of his duties, was entitled to the salary, and to whom it had been paid.

If the act of removal by the President was unauthorized, this can afford no justification for withholding the salary. It is admitted that, by *mandamus*, no act of an executive officer can be examined, which invades the exercise of his judgment or discretion. The payment of the salary, being a mere ministerial duty, positively enjoined by law, is subject to no such objection. But, may not the objection apply to the removal of *the judge? If such a [* 314] power were within the exercise of the discretion of the President, it would be conclusive. But if the act be without authority and against law, it is void; and such was the act complained of. The President could exercise no discretion on the subject; the removal was beyond his power, and the act being void, it cannot be considered as the exercise of an executive discretion. The judgment and discretion which may not be interfered with, by *mandamus*, must be in the discharge of executive duties. These do not come within the judicial power. But an unlawful, and consequently void act, by the President, by which an injury is done to an individual, cannot be covered by executive discretion. And in this case the question is incidental to the object of the *mandamus*, which is to require the secretary to perform a ministerial duty. The removal of the judge is set up by the secretary as a reason why the relator has not been paid; and if the act of removal be void, it fails to justify the refusal to pay.

The case of *Decatur v. Paulding*, 14 Pet. 513, is altogether different from the one under consideration. In the opinion of the court in that case, the chief justice showed that it was materially distinguishable from *Kendall's* case.

It would be difficult to imagine a clearer case for *mandamus* than the one before us, in my judgment; and I think it should be issued.

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If the salary has been paid to the new judge, it has been illegally paid, and that is no reason why it should not be paid to the rightful claimant.

We have nothing to do with the conduct of the judge, nor had the President. The judge was liable to be impeached and removed from office, in that form. 6 Wal. 497; 7 Wal. 847.

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FERDINAND CLARK, Appellant, v. BENJAMIN C. CLARK and WILLIAM H. Y. HACKETT.

17 H. 315.

Where a bankrupt, having a valid claim for a large sum, on the government of Mexico for the seizure of a vessel and cargo, was making efforts to obtain its allowance and payment before and after his bankruptcy, but gave no information concerning it to his assignee, and inserted in his schedule no allusion to it except "Mexican Republic subject to a mortgage." *Held*, that a purchase by him of all his effects for a nominal sum, from his assignee, in the name of a third person, at an auction sale held under an order of the court in bankruptcy, was fraudulent and void.

The assignee being dead and no other appointed, *held*, that a bill by a creditor in behalf of himself and all other creditors, to which the new assignee, when appointed, made himself a party, filed within the time required by the eighth section of the act of March 3, 1849, (9 Stats. at Large, 394,) was in compliance with that act, and the circuit court for the District of Columbia could adjudicate on the title to the fund.

The eighth section of the bankrupt act, (5 Stats. at Large, 446,) limits actions to recover property, &c., against a claimant other than the bankrupt.

APPEAL from the circuit court for the District of Columbia. The case is stated in the opinion of the court.

Lawrence and Nelson, for the appellant.

Carlisle and Johnson, contra.

[*318] * CATRON, J., delivered the opinion of the court.

Ferdinand Clark applied for the benefit of the bankrupt law, and filed a schedule of his debts, and another of his property and rights of property. Pursuant to the latter schedule, the assignee in bankruptcy sold all Clark's interest in the property and rights of property, at auction, for the sum of two dollars; Clark himself bidding at the sale but ordering the title to be made by the assignee to his (Clark's) sister, who relinquished to him by a formal deed on the next day. By virtue of this purchase, Clark claims to be *bonâ fide* owner of all the property, and rights of property, he had given in or indicated on his schedule. The bill alleges that the claim against

[*319] the republic of Mexico, *for an unlawful seizure of the cargo of a vessel owned by the bankrupt, called The Louisiana, the proceeds of which are in dispute, was not described in any man-

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ner to make the same available to Clark's creditors ; nor was any such information or evidences of the claim put into possession of the assignee as would enable him to recover it, but that all the information and evidences were fraudulently withheld by said bankrupt, and that his assets and effects generally were so described in his schedule that the assignee was ignorant of their true value, and in fact reported to the court that the same could not be sold ; and that because of this fraud the sale was void.

This allegation is put in issue by the answer, and was sustained by the circuit court, which ordered the moneys awarded to Clark by the commissioners, acting under our treaty of peace with Mexico, to be paid over to the assignee in bankruptcy, and distributed by him among the bankrupt's creditors. From this decree Clark appealed.

If the right of property to the claim for indemnity was concealed so that the assets were sold for a nominal amount, and to Clark himself in the name of his sister, then Clark's purchase was fraudulent, and the decree below, setting aside the purchase, was proper. This is the rule prescribed by the 4th section of the bankrupt law ; and which rule would be enforced by the general principles governing a court of equity, independently of the bankrupt law.

In his first schedule, the bankrupt did not mention the claim against the republic of Mexico, but in an amendment, filed in December, 1844, after he had received his discharge, this claim is alluded to in connection with others, as follows :—

“ United States government of America ” — Claim.
 Spanish government, do.
 Buenos Ayres government, do.
 “ Mexican Republic subject to a mortgage.”

This statement gave no information that the bankrupt claimed remuneration against the government of Mexico for an illegal seizure of the cargo of the schooner Louisiana. The proof is that Clark was prosecuting this claim before he applied for the benefit of the bankrupt law, which was in January, 1843, and relied on its ultimate recognition and payment through commissioners acting under treaties with Mexico. He continued to pursue the claim, steadily and earnestly, up to the time it was allowed in 1851, when there was awarded to him \$86,786.29.

Clark's letters to Mr. Caustin, his agent in Washington, who prosecuted the claim, show, as does the deposition of Mr. Caustin, * also, that in December, 1844, when the amended sched- [* 320]
 ule was filed, the bankrupt had a right to expect ultimate

success, and did rely on it with much confidence. Clark's papers and correspondence were extensive in regard to the matter, and which must have been concealed from the assignee in bankruptcy, or he would not have reported the assets as of no value in 1845, when they were sold.

From the obscurity of the schedule, and the concealment of the evidences of a right of property from the assignee and the creditors, we feel satisfied that the bankrupt intended to rid himself of his debts, and to secure to himself the effects in dispute by contrivance, and that part of the contrivance was a purchase in the name of his sister, for his own benefit.

Some minor objections to the decree below have been raised, which it is proper to notice.

First, it is insisted that the circuit court of the District of Columbia had no jurisdiction of the parties under the act of March 3, 1849, § 8,¹ to carry into effect our treaty with Mexico of 1848.² The 8th section provides, that in all cases arising under the act, where any person or persons other than those in whose favor the award was made, claimed the money awarded, should within thirty days after the date of the award notify the secretary of the treasury of his intention to contest the payment of the money to the party to whom it was awarded, and file with the district attorney a bond, &c., then the money should be retained in the treasury, subject to legal investigation in the courts of justice; and the party, claiming the fund, might file his bill in the circuit court in the District of Columbia, which should have jurisdiction to determine the right of property. In this instance the award was made on the 15th day of April, 1851, and on the 15th day of May following, Benjamin C. Clark, of Boston, a judgment creditor, filed his bill in the circuit court, claiming the fund awarded to Ferdinand Clark, and gave the notice and bond required by the act of 1849, § 8.

This was a creditor's bill, on behalf of the complainant and all other creditors of the bankrupt, and which alleged that the complainant had reason to believe the assignee, Palmer, was dead, and invites him, if living, or any subsequent assignee that might be appointed, to come in, &c. It was ascertained that Palmer was dead, and Hackett was appointed successor to Palmer, May 19, 1851, and on the 30th day of that month, made himself a party to Benjamin C. Clark's bill, by petition in the nature of an original bill. Other creditors came in likewise, but all of them after the thirty days had expired.

It is insisted that Benjamin C. Clark, as a general creditor of the

¹ 9 Stats. at Large, 396.

² *Ib.* 992.

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bankrupt, had no standing in court, his debt having been * discharged by the certificate of bankruptcy. Secondly, that [* 321] Clark had never made himself a party to the bankrupt proceedings, by proving his debt, and therefore Hackett must stand on his own bill, and cannot connect himself with that of Clark.

3. " That the circuit court of the District of Columbia had no jurisdiction in this case, except that conferred by said 8th section. The fund was in the treasury of the United States, and the parties were non-residents. Inasmuch as Hackett, the assignee, had not given the bond nor filed the notice specified in said 8th section, upon which the jurisdiction of the court was to attach, the bill should have been dismissed."

The bankrupt is personally discharged from his debts, and so are his future acquisitions; but, the property and rights of property which vested in the assignee are subject to the creditors of the bankrupt, as they were liable in his hands before he applied for the benefit of the act; and the money in controversy was held in trust for the creditors, in whatsoever hands it was found. Benjamin C. Clark was a *cestui que trust*, and the treasury a stakeholder between Ferdinand Clark and his creditors; Palmer, the assignee, had died, and there being no trustee, the creditor had a right to file a bill and detain the fund for the creditors generally, to be administered by an assignee subsequently appointed by the bankrupt court.

The circumstance that Benjamin C. Clark has not proved his debt, and made himself a party to the proceedings in bankruptcy, is immaterial; the proof that debts were owing by Ferdinand Clark can be made at such times as the bankrupt court may prescribe by its rules and orders; and we are not aware that any objection can be interposed to reject Benjamin C. Clark's claim in the bankrupt court of New Hampshire. All the creditors seem to be in the same condition, no one having proved his debt. Benjamin C. Clark having the right to sue and detain the fund in the treasury; Hackett could properly come in, and make himself a party to the proceeding.

It is also insisted that this action is barred by the 8th section of the bankrupt law, which provides that no suit shall be maintainable against any person claiming an adverse interest touching property or rights of property surrendered by the bankrupt, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued.

The interest adversely claimed, and which the statute protects, if not sued for within two years, is an interest in a claimant other than the bankrupt; but, supposing that Ferdinand Clark had been placed in that condition, as to the fund in the treasury, by his pretended

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[* 322] purchase of his own assets, yet as no cause of * action accrued to the assignee in bankruptcy against Clark, until he got possession of the money, and as he never held the fund adversely, it follows that the act does not apply ; but if it did, the fund had no existence till the award was made, which was only thirty days before the suit was brought. We order that the decree of the circuit court be affirmed. .

17 H. 822; 1 B. 77.

WILLIAM A. BOOTH, Appellant, v. FERDINAND CLARK.

17 H. 322.

The appointment of a receiver, under a creditor's bill, filed in a court of chancery of the State of New York, against one who was a resident of that State, did not vest in the receiver the debtor's claim against a foreign government.

The nature and extent of the title of a receiver, and the operation of foreign bankrupt and insolvent laws examined.

THE case is stated in the opinion of the court.

Bradley, for the appellant.

Lawrence and May, contra.

[* 327] * WAYNE, J., delivered the opinion of the court.

We learn from the record of this case that Juan de la Camara recovered a judgment in the supreme court of New York, against Ferdinand Clark, for \$4,688.49, with interest at seven per cent. ; that a *fieri facias* was issued upon the judgment, and that there was a return upon it of "no goods, chattels, or real [* 328] estate of the defendant * to be levied upon." Upon this return, Camara filed a creditor's bill, before the chancellor of the first circuit in the State of New York, setting out his judgment and the return upon the *fieri facias*, in which he seeks, under the laws of that State, to subject the equitable assets and *choses in action* of Clark to his judgment ; and he asks for a discovery of them from Clark, for an injunction, and the appointment of a receiver. Notice of this proceeding, and of the action upon it were served upon the solicitor of Clark, and the bill of complaint was taken as confessed, upon the defendant's default in not answering. Booth, the present complainant, was appointed receiver on the 3d August, 1842. Clark had been previously enjoined under the proceeding from making any disposition of any part of his estate, legal or equitable. Thus matters stood from the time of the receiver's appoint-

ment, in 1842, until June, 1851. Then Booth, as receiver, reports that no effects of Clark had come to his knowledge, except a claim upon Mexico, which had been adjudged to Clark by the United States commissioners, under the treaty with Mexico; and that, as receiver, he was contesting it; and he asks from the court authority to proceed for that purpose, which was granted. Such is an outline of the case in New York, containing every substantial part of it.

We will now state the proceedings of this suit at the instance of the receiver, in the circuit court of the United States for the District of Columbia, from the decision of which, dismissing the receiver's bill, it has been brought to this court for revision.

On the 29th May, 1851, Booth, the receiver, filed his bill in the circuit court for the District of Columbia, reciting so much of the proceedings of the New York courts as was deemed necessary to support his suit. He declares that Clark, when the original suit was instituted against him by Camara, and from that time until after he had been appointed receiver, had resided in New York. That his effects consisted principally, if not wholly, of the claim upon Mexico, and that he claimed that fund as receiver for the purposes of that appointment. Clark answered the bill. He denies that the proceedings against him in the courts of the State of New York created any lien in behalf of Camara, or the receiver, upon the fund in controversy. He admits that no part of his property ever came into receiver's hands, under those proceedings, and that he had the claim upon Mexico whilst the suits were pending against him, and when the receiver was appointed under Camara's creditor's bill; but that all the evidences and papers in support of his Mexican claim were then in the public archives at Washington. He also states, that the board of commissioners under the act of congress of March, 3, 1849,¹ entitled "An act to carry into effect certain *stipu- [* 329] lations of the treaty between the United States and the republic of Mexico,² of the 2d February, 1848," had made an award in his favor for the sum of \$86,786.29, which sum was then in the hands of the secretary of the treasury of the United States. He then alleges that, being a resident of the State of New Hampshire, he filed in the clerk's office of that district, on the 28th January, 1843, his petition to be declared a bankrupt. That he had been declared a bankrupt on the 22d March following, pursuant to the "act to establish a uniform system of bankruptcy throughout the United States," passed August 19, 1841.³ He then recites that there had been attached to his petition in the bankrupt's court, a schedule of his property, rights, and credits of every kind and description, in

¹ 9 Stats. at Large, 893.² Ib. 992.³ 5 Ib. 440.

which his Mexican claim had been stated; and that it was upon that claim the commissioners had awarded to him the sum before mentioned. He declares that, under the decree of the court in bankruptcy, one John Palmer had been appointed assignee; and that, having given his bond in compliance with the order of the court, he was vested, as assignee, in virtue of the operation of the bankrupt law, of all the defendant's property, for the benefit of his creditors, including the Mexican claim. It is also stated in his answer, that notice of all the proceedings in his matter of bankruptcy had been published in the leading newspapers of New Hampshire, and that the name of Juan de la Camara, and his residence, was placed among the list of his creditors attached to his petition to be declared a bankrupt. And he avers that all of his creditors had had notice of the proceedings in bankruptcy. That neither Camara nor any other creditor had filed or made any objections to those proceedings, or to the action of the assignee, until after the award had been made upon the Mexican claim.

It is not necessary, for the purposes of this opinion, to state the defendant's recital of the sale of his effects by Palmer, the assignee; his purchase of them, including the Mexican claim, or the rights claimed by the defendant under his purchase, all relating to the same having been fully acted upon by this court at this term, in the case of Ferdinand Clark v. Benjamin C. Clark and W. H. Y. Hackett. We state, however, that Palmer, the original assignee in Clark's bankruptcy, having died, he had been succeeded by the appointment of Hackett as assignee. This suit, then, is substantially between Hackett, as the assignee of Clark in bankruptcy, and Booth, the receiver under Camara's creditor's bill; that it may be determined by this court, which of them has the official right to the Mexican fund, for the distribution of it between the creditors of Clark, or whether

Booth, as receiver, shall have from that fund a sufficient
[* 330] sum to pay * Camara's entire debt, leaving the residue of it for distribution between Clark's other creditors.

It appears also from the record that Booth, the receiver, took no steps to execute his official trust, from the time of his appointment in 1842, until 1851, after the award of the Mexican claim had been made in Clark's favor. And, also, that the court of chancery, acting upon the creditor's bill brought by Camara, had not been applied to, either by Camara or by the receiver, for any order upon Clark *in personam*, to coerce his compliance with its injunction and decree.

Upon this statement of the case, we will now consider it. There is no dispute concerning the regularity or binding operation of the judgment obtained by Camara against Clark. None in respect to

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the proceedings under the creditor's bill. The leading point in the case is the effect of the proceedings under the last, to give a right to the receiver, in virtue of a lien which he claims upon the property of the debtor, to sue for and to recover any part of it, legal or equitable, without the jurisdiction of the State of New York. In other words, as an officer of a court of chancery, for a particular purpose, will he be recognized as such by a foreign judicial tribunal, and be allowed to take from the latter a fund belonging to a debtor, for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues, contesting his right to do so. Or can he as receiver claim, in virtue of a decree upon a creditor's bill given in one jurisdiction, a right to have the judgment upon which the creditor's bill was brought, paid out of a fund of a bankrupt debtor in a foreign jurisdiction; because his appointment preceded the bankrupt's petition.

It is urged that the receiver in this case, by the decree of the court in New York, was entitled officially to the entire property of Clark, real, personal, or equitable, both within and without the State of New York. That he could, as receiver, maintain any action for the property and rights of property of the debtor which the latter could have done. That the fund now in controversy was a *chose in action*, belonging to the debtor when the receiver was appointed, and, though not within the State of New York, that it followed the person of the owner and passed to the receiver, because the owner was domiciled in New York. And it was also said that, having such official rights or liens upon the property of the debtor, the comity of nations would aid him in the assertion of them in a foreign tribunal. The counsel for the receiver cited from the reports of the State of New York several cases in support of the foregoing propositions. We have perused all of them carefully, without having been * able to [* 331] view them altogether as the learned counsel does. Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the State of New York, and his right to sue for them there, we do not find any thing in the cases in the New York reports showing the receiver's right to represent the creditor or creditors of the debtor in a foreign jurisdiction. It is true that the receiver in this case is appointed under a statute of the State of New York, but that only makes him an officer of the court for that State. He is a representative of the court, and may, by its direction, take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession. But it is not considered in

every case that the right to the possession is transferred by his appointment; for, where the property is real, and there are tenants, the court is virtually the landlord, though the tenants may be compelled to attorn to the receiver. Jeremy's Equity Jurisprudence, 249. When appointed, very little discretion is allowed to him, for he must apply to the court for liberty to bring or defend actions, to let the estate, and in most cases to lay out money on repairs, and he may without leave distrain only for rent in arrear short of a year. 6 Vesey, 802; 15 *ibid.* 26; 3 Bro. C. C. 88; 9 Ves. 335; 1 Jac. & W. 178; Morris and Elme, 1 Ves. Jr. 139; 1 *ibid.* 165; Blunt and Clithero, 6 Ves. 799; Hughes and Hughes, 3 Bro. C. C. 87; 5 Madd. 473.

A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt's Prac. Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. Delany v. Mansfield, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court; Verplanck v. Mercantile Insurance Company, 2 Paige, C. R. 452. Unless where he is appointed under the statute of New York, directing proceedings against corporations, (2 R. S. 438,) and then he is a standing assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. Attorney-General v. Life and Fire Insurance Co. 4 Paige, C. R. 224. In the [* 332] case just cited, Chancellor Walworth says, that "the receiver has "no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." In the statement which has been made of the restraints upon a receiver, we are aware that they have been measurably qualified by rules, and by the practice of the courts in the State of New York, as may be seen in Hoffman's Practice; but none of them alter his official relation to the court, and, so far as we have investigated the subject, we have not found another instance of an order in the courts of the State of New York, or in the courts of any other State, empowering a receiver to sue in his own name officially in another jurisdiction for the property or *choses in action* of a judgment debtor. Indeed, whatever may be the receiver's rights under a creditor's bill, to

the possession of the property of the debtor in the State of New York, or the permissions which may be given to him to sue for such property, we understand the decisions of that State as confining his action to the State of New York.

Such an inference may be made from several decisions. It may be inferred from what was said by Chancellor Walworth, in *Mitchell v. Bunch*, 2 Paige, C. R. 615. Speaking of the property which might be put into the possession of a receiver, and of the power of a court of chancery to reach property out of the State, he declares the manner in which it may be done, thus: "The original and primary jurisdiction of that court was *in personam* merely. The writ of assistance to deliver possession, and even the sequestration of property to compel the performance of a decree, are comparatively of recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of attachment against the bodies of the parties to compel obedience to its orders and decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the defendant claims an equitable title, within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vest the legal title, as well as the possession of the property, according to the *lex loci rei sitæ*." It is very obvious, from the foregoing extract, that up to the time when *Mitchell v. Bunch* was decided, in the year 1831, it had not been thought that a court of chancery in the State of New York could act upon the property of a judgment debtor in a creditor's bill which was not within the State of New York, but by the coercion of his person when he was within the jurisdiction of the State; *and that it had not been contemplated then to add to the [* 333] means used by chancery to enforce its sentences, in respect to property out of the State of New York, the power to a receiver to sue in a foreign jurisdiction for the same. It is true that the jurisdiction of a court of chancery in England and the United States, to enforce equitable rights, is not confined to cases where the property is claimed in either country, but the primary movement in the chancery courts of both countries to enforce an injunction, is the attachment of the person of the debtor, where he is amenable to the jurisdiction of the court.

We find in the 2d volume of Spence on the jurisdiction of the court of chancery in England, (6, 7,) this language: When, there-

fore, a case is made out against a person resident within the jurisdiction of the court, in respect to property out of it, but within the empire, or its dependencies, which would call for the interference of the court of chancery if the property were situate in the country, the court, as it had the power, has assumed the jurisdiction, when such an interference is necessary to the ends of justice, of enforcing the equitable rights of the parties to or over property out of its jurisdiction, by the coercion of the person and sequestration of his property here, in the same manner as it would have done had the property been situate in this country. And Sir John Leach said: "When parties defendants are resident in England, and are brought upon subpœna here, the court has full authority to act upon them personally, with respect to the subject of the suit, as the ends of justice require, and with that view to order them to take or to omit to take any steps or proceedings in any other court of justice, whether in this or in a foreign country. This court does not pretend to any interference with the other courts." It acts upon the defendant by punishment for his contempt, for his disobedience of the court. The court of chancery has no power directly to affect property out of the bounds of its jurisdiction. *Roberdeau v. Rous*, 1 Atk. 544; 2 Spence. We believe such to be the proper course, in chancery, in cases of injunction, and that its jurisdiction, by injunction, rests entirely on the coercion of the person. Such, however, was not the course pursued in this case, though the debtor was then a resident of the State of New York, and amenable to the jurisdiction of the court. No motion was made to force Clarke to comply with the injunction which Camara had obtained under the creditor's bill. The matter was allowed to rest for seven years, Camara being aware that Clarke had a pecuniary claim upon the republic of Mexico, at least as early as in the year 1843. The receiver during all that time took no action. His first movement is an application to be permitted to sue for the fund in the hands of the government, which had been awarded to Clarke by the commissioners under [* 334] the treaty *with Mexico. Permission was given to sue.

He has brought his bill accordingly, and it directly raises the question, whether he can, as an officer of the court of chancery in New York, and in his relation of receiver to Camara, be permitted to sue in another political jurisdiction.

We have already cited Chancellor Walworth's opinion as to the course which is to be pursued in New York upon an injunction in a creditor's bill. Mr. Edwards, in his excellent work on Receivers in Chancery, after citing the language used in *Mitchell v. Bunch*, says: "Still, the difficulty remains as to a recognition of the powers or

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officers of the court, by persons holding a lease upon the property, especially realty, out of the jurisdiction. Then in *Malcolm v. Montgomery*, 1 Hogan, 93, the master of the rolls observed, that a receiver could not be effectually appointed over estates in Ireland, by the English court of chancery, in any direct proceeding for the purpose; and that attempts had often been made to do so by serving orders made by the English court of chancery, but that they had failed, because the English court of chancery has no direct means of enforcing payment of rent to its receiver, by tenants who reside in Ireland. The attorney-general and another counsellor also said, that to their knowledge such attempts had been frequently made, but had been uniformly given up as impracticable. A conflict might also arise between the receiver out of the jurisdiction and creditors, and also other persons out of the jurisdiction. The comity of nations and different tribunals would hardly help a receiver."

We also infer, from the case of *Storm and Waddell*, in 2 Sandford, 494, that the receiver's right to the possession of the property of a debtor in the State of New York, and his right to sue for property there, is limited to that jurisdiction. The chancellor, in the last case mentioned, after having given an epitome of the cause of proceeding in a creditor's bill, and speaking of equitable interests and things in action belonging to the debtor, without regard to the injunction, says: "The property of the defendant is subjected to the suit, wherever it may be, if the receiver can lay hold of it, or the complainant can reach it by the decree. The injunction, when served, prevents the debtor from putting it away or squandering it." This language indicates the receiver's locality of action. Taken in connection with that of Chancellor Walworth, in *Mitchell v. Bunch*, it shows that the receiver's right to the possession of the debtor's property is limited to the jurisdiction of his appointment, and that he has no lien upon the property of the debtor, except for that which he may get the possession of without suit, or for that which, after having been permitted to sue for, he may reduce into possession in that way. Our industry has been tasked unsuccessfully to

* find a case in which a receiver has been permitted to sue [* 335] in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal; orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the last.

We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, after the manner of such nations as practise

it, in respect to the judgments and decrees of foreign tribunals, for all of them do not permit it in the same manner and to the same extent, to make such comity international or a part of the laws of nations. But it was said that receivers in New York are statutory officers, as assignees in bankruptcy are. That being so, he had, as assignees in bankruptcy have upon the property of the bankrupt, a lien upon the property of a judgment debtor, under an appointment in a creditor's bill. But that cannot be so. An assignee in bankruptcy in England, and in this country when it had a bankrupt law, is an officer made by the statute of bankruptcy, with powers, privileges, and duties prescribed by the statute, for the collection of the bankrupt's estate for an equal distribution of it among all of his creditors.

In England, the property of the bankrupt is vested in the assignees in bankruptcy by legislative enactment. Where commissioners have been appointed, it is imperative upon them to convey to the assignees the property of the bankrupt, wherever it may be or whatever it may be, and it is done by deed of bargain and sale, which is afterwards enrolled. It vests the assignees with the title to the property from the date of the conveyance, it having been previously vested in the commissioners for conveyance by them to the assignees. As to the bankrupt's personal estate, the statute looks beyond the debts and effects of a trader within the kingdom, and vests them in the commissioners in every part of the world. The last is done in England, upon the principle that personal property has no locality, and is subject to the law which governs the person of the owner. As by that law the property of a bankrupt becomes vested in the assignee, for the purposes of the assignment, his title to such property out of England is as good as that which the owner had, except where some positive law of the country, in which the personal property is, forbids it. Cullen, 244.

In claiming such a recognition of assignees in bankruptcy from foreign courts, England does no more than is permitted in her courts, for they give effect to foreign assignments made under laws [* 336] * analogous to the English bankrupt laws. *Solomons v. Ross*, 1 H. B. 131, n.; *Jollet v. Deponthieu*, *ibid.* 132, n. But such comity between nations has not become international or universal. It was not admitted in England until the middle of the last century in favor of assignees in bankruptcy. Lord Raymond decreed it in 1811, in the case of a commission of bankruptcy from Holland. Sir Joseph Jekyll, in 1715, said, the law of England takes no notice of a commission in Holland, and therefore a creditor here may attach the effects in the city of London, and proceed to condemnation. 3 Burge, 907. Lord Mansfield, in *Warring v. Knight*,

(sittings in Guildhall, after Hilary term, Geo. III., Cooke's Bank Laws, 200, 3 Burge, 907,) ruled, that where an English creditor proceeded, subsequent to an act of bankruptcy, by attachment in a foreign country, and obtained judgment there and satisfaction by the sale of the debtor's personal property, the assignees in an action in England could not recover from such creditor the amount of the debt which had been remitted to him. Again, his lordship ruled, that the statutes of bankrupts do not extend to the colonies or any of the king's dominions out of England, but the assignments under such commissions are, in the courts abroad, considered as voluntary, and as such take place between the assignee and the bankrupt, but do not affect the rights of any other creditors.

So the law stood in England until the case of *Folliott v. Ogden*, 1 H. Bl. 123, when Chancellor Northington stimulated it into a larger comity, by giving effect to a claim to the creditors of a bankrupt in Amsterdam over an attaching creditor in England, who had proceeded after the bankrupt had been declared to be so, by the proper tribunal in Amsterdam. England had just then become the great creditor nation of Europe, and of her provinces in North America. Her interest prompted a change of the rule, and her courts have ever since led the way in extending a comity which had before been denied by them. The judicial history of the change, until the comity in favor of assignees became in England what it now is, is given in 3 Burge, c. 22; Bankrupt Laws, 886, 906-912, inclusive, and from 912-929. It may now be said to be the rule of comity between the nations of Europe; but it has never been sanctioned in the courts of the United States, nor in the judicial tribunals of the States of our nation, so far as we know, and we know that it has been repeatedly refused in the latter. Our courts, when the States were colonies, had been schooled, before the Revolution, in the earlier doctrines of the English courts upon the subject. The change in England took place but a few years before the separation of the two countries.

* That comity has not yet reached our courts. We do [* 337] not know why it should do so, so long as we have no national bankrupt laws. The rule which prevailed whilst these States were colonies still continues to be the rule in the courts of the United States, and it is not otherwise between the courts of the States. It was the rule in Maryland, before the Revolution. It is the rule still, as may be seen in *Birch v. McLean*, 1 Harris & McHenry, 286; *Wallace v. Patterson*, 2 How. & McHenry, 463. An assignment abroad, by act of law, has no legal operation in Pennsylvania. We find from *McNeil and Colquhoun*, 2 Haywood, 24, that it has been the rule in North Carolina for sixty years. South

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Carolina has no other. 1 Const. Rep. S. C. 283; 4 McCord, 519 Taylor v. Geary, Kirby, 313. In Massachusetts, the courts will not permit an assignment in one of the States, whether it be voluntary or under an insolvent law, to control an attachment in that State of the property of an insolvent which was laid after the assignment, and before payment to the assignees. The point occurred recently in the circuit court of the United States for that district, in the case of Betton, assignee, v. Valentine, 1 Curtis, 168; and it was ruled that the assignee of an insolvent debtor, appointed under the law of Massachusetts, does not so far represent creditors in the State of Rhode Island as to be able to avoid a conveyance of personal property in the latter State, good as against the insolvent, but invalid as against creditors, by the law of Rhode Island.

In New York, the "ubiquity of the operation of the bankrupt law, as respects personal property," was denied in Abraham v. Plestoro, 3 Wend. 538. Chancellor Kent considers it to be a settled part of the jurisprudence of the United States, that a prior assignment under a foreign law will not be permitted to prevail against a subsequent attachment of the bankrupt's effects found in the United States. The courts of the United States will not subject their citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control. We think that it would prejudice the rights of the citizens of the States to admit a contrary rule. The rule, as it is with us, affords an admitted exception to the universality of the rule that personal property has no locality, and follows the domicile of the owner. This court, in Ogden v. Saunders, 12 Wheat. 213, disclaimed the English doctrine upon this subject; and in Harrison v. Sterry, 5 Cranch R. 289, 302, this court declared that the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States.

Such being the rule in the American courts, in respect to [* 338] * foreign assignments in bankruptcy, and in respect to such assignments as may be made under the insolvent laws of the States of the United States, there can be no good reason for giving to a receiver, appointed in one of the States under a creditor's bill, a larger comity in the courts of the United States, or in those of the States or territories. On the contrary, strong reasons may be urged against it. A receiver is appointed under a creditor's bill for one or more creditors, as the case may be, for their benefit, to the exclusion of all other creditors of the debtor, if there be any such, as there are in this case. Whether appointed as this receiver was, under the statute of New York, or under the rules and practice of

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chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment, he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek.

In those countries of Europe in which foreign judgments are regarded as a foundation for an action, whether it be allowed by treaty stipulations or by comity, it has not as yet been extended to a receiver in chancery. In the United States, where the same rule prevails between the States as to judgments and decrees, aided as it is by the first section of the 4th article of the constitution, and by the act of congress of 26th May, 1790,¹ by which full faith and credit are to be given in all of the courts of the United States, to the judicial sentences of the different States, a receiver under a creditor's bill has not as yet been an actor as such in a suit out of the State in which he was appointed. This court considered the effect of that section of the constitution, and of the act just mentioned, in *McElmoyle and Cohen*, 13 Pet. 324-327. But apart from the absence of any such case, we think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application * and [* 339] distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where

¹ 1 Stats. at Large, 122.

it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver.

Besides, there is much less reason for allowing the complainant in this case to be recognized as receiver for the fund out of the State of New York, and in this jurisdiction, even if the practice in chancery in respect to receivers was different from what we have said it was. The remedies which the judgment creditor in New York had under his creditor's bill against his debtor, were not applied as they might have been in that State, according to the practice in chancery in such cases. When Clark had been enjoined under the creditor's bill, and the receiver had been appointed, both judgment creditor and receiver knew at the time, — certainly, as the record shows, in a short time afterwards, — that Clark had a pecuniary claim upon the republic of Mexico. No attempt was made, according to chancery practice, to coerce Clark by the attachment of his person under the injunction, to make an assignment of that claim for the payment of Camara's judgment. It cannot be said that Clark had not property to assign, and that it was therefore unnecessary to attach him. That would make no difference; for whether with or without property, he might have been compelled to make a formal assignment, even though he had sworn that he had none. It was so ruled in *Chipman v. Sabbaton*, 7 Paige, C. R. 47, and in *Fitzburgh v. Everingham*, 6 Paige, 29.

There was a want of vigilance in this matter, which does not make any equity which he may have in New York upon Clark's property, superior to that of Clark's creditors, who are pursuing the funds in this district. Nor, according to the rule prescribed in the United States, that personal property has no locality on account of the domicile of the owner, to transfer it under a foreign assignment, can the receiver have in this case any thing in the nature of a lien to bind the property of Clark not within the State of New York. When we take into consideration also the origin of the fund in controversy, the manner of its ultimate recovery from Mexico, the congressional action upon it, in every particular, to secure it, after the awards were made, to those who might be entitled to receive it; the jurisdiction given to the circuit court of this district, with an appeal from its decision to this court, upon the principles which govern courts of equity to adjudge disputes concerning it, and that such cases were to be conducted and governed in all respects as in other cases in equity, we must conclude that the complainant in this case, as receiver, cannot be brought under the rule prescribed for our decision. We concur with the court below in the dismissal of the bill.

LEVI D. BOONE, Administrator of JESSE B. THOMAS, deceased, and the Heirs of J. B. THOMAS, Complainants and Appellants, v. THE MISSOURI IRON COMPANY.

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Specific performance refused, on the ground of laches, and non-performance by the complainants, and loss of title.

THE case is stated in the opinion of the court.

B. R. Hill, for the respondent.

No counsel *contra*.

* M'LEAN, J., delivered the opinion of the court. [* 341]

This is an appeal from the circuit court of the United States for the district of Missouri.

The bill prays the specific execution of a contract between Thomas and the Missouri Iron Company, dated 15th August, 1839, which requires the defendants to give up and cancel the notes of Thomas to Nancy Bullett, for \$10,000, dated 2d November, 1836; to pay a debt due to Martin Thomas; to sell or transfer on the books of said company, for the use of the complainant, \$43,000 worth of stock of said company, or, in the alternative, that the American Iron Company may be decreed to reconvey the one undivided seventh part of the Iron Mountain tract to the complainant.

The complainant died in 1849, and, his death being suggested, an amended bill was filed, praying for an account of rents and profits, for the use of the land and consumption of ores, timber, &c., by the defendants, and for a decree of title, &c.

On the 2d November, 1836, Nancy Bullett, widow, sold to her brother, the complainant, one undivided seventh part of a tract of 20,000 arpens of land, in Washington county, Missouri, known as the Iron Mountain tract; and she executed to him a title-bond of that date, with the condition that she would convey to him the above interest on the payment of two notes for \$5,000 each, one payable at six, the other at twelve months, from the date of the bond. On the 15th of November, 1836, Thomas made a similar title-bond to John L. Van Doren, with the condition to make a deed, upon his paying the two notes of \$5,000 each to Mrs. Bullett; and also three notes, of \$5,000 each, given by him to Thomas, at eighteen, twenty-four and thirty months, from the date of the bond.

On the 31st of December, 1836, the Missouri Iron Company was incorporated by the legislature of Missouri, and Van Doren, Pease, and Co. were named in the act as corporators. The company was

organized; books were opened to sell the capital stock; Van Doren was appointed to obtain subscribers, but, being unsuccessful, he failed, made an assignment, and became insolvent. Agents were appointed to visit foreign countries; who returned, making a report that a banker in Amsterdam subscribed \$600,000 of stock. The stock was raised to \$5,000,000, but the company soon became hopelessly embarrassed.

[* 342] * On the 22d of February, 1839, James Bruce, who married Mrs. Bullett, conveyed all their interest in the one seventh of the Iron Mountain tract, to Allen and Sloan, and also assigned the notes of Thomas to them, for the consideration of \$4,500. At the same time Allen and Sloan gave a bond to Bruce and wife, to convey to Thomas all their interest in the one seventh of the tract, on his paying to them \$9,000, the amount due on the original purchase.

On the 15th of August, 1839, A. Jones, president of the company, executed the following receipt to Thomas, under which he claims a specific performance against the Missouri Iron Company, and the other defendants, to wit: "Received of Jesse B. Thomas, of Sangamon county, Illinois, a transfer of \$71,400 of the capital stock of the Missouri Iron Company, \$43,000 of which is to be transferred to Julius Sichel, of Amsterdam, to consummate a contract entered into with him. The residue of the stock to be appropriated to pay the balance due on the two notes given to Mrs. Bullett," &c.

On the 2d September, 1841, the board resolved, that the president be authorized to receive back from Thomas the stock issued to him, &c.; and the secretary addressed to him a letter, saying: "You will perceive that, by the above resolution, the president is authorized to cancel the bond or agreement, in relation to the transfer of your interest in the Iron Mountain tract. As the chance of doing something with the property is better than the stock, I presume you can have no objection to making the transfer; the company is about to be dissolved, and the stock is worth nothing," &c.

It does not appear that this communication was ever answered by Thomas. He never paid, or offered to pay, the money due to Mrs. Bullett, or to Allen and Sloan, her assignees. He did not transfer to the company the 714 shares of stock, nor demand the cancellation of Mrs. Bullett's title-bond, that he had assigned to the company. Nor does it appear that he did any act to fulfil his contract with Mrs. Bullett.

In January, 1842, it appears the company failed, and all its property was sold on execution. In the amended bill, it is averred that, in 1842, the Missouri Iron Company was dissolved, being insolvent. C. C. Zeigler became the purchaser, at sheriff's sale, of all the Iron

Mountain tract, for which he received the sheriff's deed, dated 6th July, 1841; and, on the 6th of January, 1842, the Missouri Iron Company sold the tract to Zeigler, and executed a deed to him.

A decree had been rendered in the circuit court of St. Francois county, at the suit of Allen and Sloan, assignees of Mrs. Bullett, against Thomas and J. L. Van Doren, for the sum of * \$11,475, which was the consideration for the purchase of [* 343] the undivided seventh part of the Iron Mountain tract, which was declared to be an equitable lien on the interest purchased; and, under the decree of May 8, 1843, the property was sold to Zeigler, and both Thomas and Van Doren were barred and precluded, by the decree, from enforcing any rights against the same. Pending that suit, Zeigler purchased the interest of Allen and Sloan in the title-bond of Mrs. Bullett to Thomas, and the notes of Thomas given to Mrs. Bullett, for \$6,500.

It appears that, on the 24th of January, 1843, the American Iron Company was incorporated, and that Zeigler sold the Iron Mountain tract to the company.

There is no evidence showing a connection between the Iron Mountain Company first formed, and the present American Iron Company, except that the latter company is in possession of the same property, claiming it by sheriff's sale and deeds of conveyance under a decree, and from parties who were corporators of the first company and who represented the company.

It would be difficult to find any case where the objections to the specific execution of a contract are more insuperable than in this case. In the first place, the consideration for which the property was purchased has not been paid; and the statute of limitations would have barred a recovery on the notes given, if suit had been brought on them at the time this bill was filed. It is true the purchaser from Thomas, Van Doren, agreed to pay these notes; but, not having done so, the assignment affords no excuse for the negligence of Thomas in his lifetime. And there is no principle in equity better settled, than that he who asks a specific execution of his contract must show a performance on his part, or that he has offered to perform. Neither of these has been done in this case.

In addition to this, it appears that the property claimed by the representatives of Thomas, which he never paid for, was sold in 1841, under a judgment obtained by *Martin v. Van Doren, Pease, and Co.*, the corporators named in the Missouri Iron Company, by the sheriff, and that C. C. Zeigler became the purchaser; and after this, the 6th of January, 1842, the Missouri Iron Company sold the Iron Mountain tract to Zeigler, and executed to him a deed. In the same year the company was dissolved, being insolvent.

Burchell v. Marsh. 17 H.

It also appears that a decree was rendered for the purchase-money, in 1843, which the court held as an equitable lien upon the land, and the land was decreed to be sold for the payment of the consideration money; and one seventh of the whole tract, the amount purchased by Thomas, was, on the 8th of May, 1843, sold. This proceeding was had, on the ground that Thomas had abandoned his claim to the land.

[* 344] *By various efforts and contrivances, the stock of the first company was advanced \$5,000,000, but as might be expected, after such an inflation, the stock proved to be worth nothing, and the owners became insolvent.

Under the American Iron Company, which succeeded the first company, extensive works have been established, and a prosperous business in mining is carried on.

On a full consideration of this complicated case, there seems to be no ground of equity on which relief can be given to the complainants. On the contrary, their equity appears to have been extinguished by negligence, in not paying the consideration, by the sale of the property by the sheriff, also under a decree of a court having jurisdiction of the case, and also by a conveyance of the Missouri Iron Company. A minute statement of the facts would be tedious, and cannot be necessary, as the case is free from doubts by the outline above given.

The decree of the circuit court, which dismissed the complainant's bill, is affirmed.

PETER J. BURCHELL, Appellant, v. STEWART C. MARSH, ALEXANDER FREAR, and WILLIAM M. ARBUCKLE.¹

17 H. 344.

If an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing, a court of equity will not set it aside, for error in law or fact.

The case examined, and held not to show such excess of authority, or unfairness of intention, or negligent consideration of the case, as should induce the court to interfere.

APPEAL from the circuit court of the United States for the district of Illinois. The facts appear in the opinion of the court.

Gillet, for the appellant.

Carlisle and *Washburne*, contra.

[* 349] *GRIER, J., delivered the opinion of the court.
This case was submitted on bill and answer. The appel-

¹ TANEY, C. J., and WAYNE, J., did not sit in this cause.

lees, who were complainants below, pray the court to set aside an award made between the parties, as "fraudulent and void." The bill charges that "the award was made either from improper and corrupt motives, with the design of favoring said Burchell, or in ignorance of the rights of the parties to said submission, and of the duties and powers of the arbitrators who signed the said award."

The answer denies "that the arbitrators acted unjustly, or with partiality or ignorance, in making their award; but avers that they acted justly, fairly, and with a due consideration of the rights of the parties." This allegation of the answer must be taken to be true, unless it appears, from other facts admitted by it, that this conclusion or averment founded on them is incorrect.

In the consideration of this case, it will not be necessary to encumber it with a history of the facts charged and admitted or denied by the pleadings, except as they shall be incidentally noticed. The general principles, upon which courts of equity interfere to set aside awards, are too well settled by numerous decisions to admit of doubt. There are, it is true, some anomalous cases, which, depending on their peculiar circumstances, cannot be exactly reconciled with any general rule; but such cases can seldom be used as precedents.

Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation. In order, says Lord Thurlow, (*Knox v. Symmonds*, 1 Ves. Jr. 369,) "to induce the * court to interfere, there must be [* 350] something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award, or to be made out by evidence; but in case of mistake, it must be made out to the satisfaction of the arbitrator, and that if it had not happened, he should have made a different award."

Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps,

to impute either weakness of intellect or corrupt motives to those who differ with us in opinion.

1. The first objection to the award in this case is, that it is not within the submission. But we are of opinion this objection is without foundation.

The submission recites that controversies and disputes had arisen between the firm of Marsh and Freer, and of Freer and Arbuckle, with Burchell. It states the controversies to have arisen from suits brought by said firms against Burchell, to recover certain debts claimed to be due by him to the firms, respectively, "and the said Burchell claims to have sustained damages by reason of having been sued by said firms, and by reason of the doings of the said firms towards him." The parties, therefore, agreed to submit "all demands, suits, claims, causes of action, controversies, and disputes between them, to the arbitration and award of F. B. Mosley," &c., "who are to hear all matters of claim of either party, upon or against the other, in law or equity."

On the hearing, the arbitrators received evidence of the debts alleged to be due from Burchell to the two firms, and of the alleged oppressive and ruinous suits brought against him by one Cross, who acted as agent of the firms. The witnesses, in proving these transactions, were permitted to state certain slanderous language used by Cross in speaking to and of Burchell, charging him with dishonesty and perjury. When this testimony was offered, the complainants' counsel agreed that it might be received, subject to exceptions.

It has been argued, that because the arbitrators received evidence of the slanderous language used by Cross, that, therefore, they included in their award damages for his slanders, for which his principals would not be liable; and that, therefore, they had taken into consideration matters not contained in the submission. But the answer to this allegation is, that the record shows no admission or proof that the arbitrators allowed any damages for the slanders [*351] of Cross. Whether the complainants were liable, and how far they were justly answerable for the conduct of their agent, were questions of law and fact submitted to the arbitrators. All these questions were fully argued before them by counsel. Whether their decision on them was erroneous, does not appear. The transactions which were testified to, with regard to the suits brought against Burchell, and whether they were oppressive, wrongful, and ruinous to him, was one of the very matters submitted to the arbitrators. The words as well as the acts of Cross made part of the *res gestæ*, and could not well be severed in giving a history of them. Every presumption is in favor of the validity of the award

If it had stated an account, by which it appeared that the arbitrators had made a specific allowance of damages for the slanders of Cross, it would have been annulled, to that extent at least, as beyond the submission. But it cannot be inferred that the arbitrators went beyond the submission, merely because they may have admitted illegal evidence about the subject-matter of it.

We are of opinion, therefore, that there is nothing on the record to show that the arbitrators, in making this award, exceeded their authority, or went beyond the limits of the submission.

2. The charges of fraud, corruption, or improper conduct in the arbitrators, as we have seen, are wholly denied by the answer, which must be assumed to be true, unless facts are admitted from which they are a necessary or legal inference. We can see nothing in the admitted facts of the case from which any such inference can be justly made. The damages allowed for the alleged oppression of Burchell, and the ruin of his business as a merchant, may seem large to some, while others may think the sum of four, or even five thousand dollars as no extravagant compensation for such injuries. It may be admitted that, on the facts appearing on the face of the record, this court would not have assessed damages to so large an amount, nor have divided them so arbitrarily between the parties; but we cannot say that the estimate of the arbitrators is so outrageous as of itself to constitute conclusive evidence of fraud or corruption. Damages for injuries of this sort cannot be measured by any rules, nor can the court properly impute corruption to others, because they differ with them in their estimation of a matter which depends on discretion rather than calculation. It is enough that the parties have agreed to trust the discretion and judgment of neighbors acquainted with them, and their relative standing and credit. The admission of witnesses to prove their estimate of the damages, (even if it had been in the face of the objection of counsel, and not by consent,) may have * been an error in judgment, but [* 352] it is no cause for setting aside the award; nor can the admission of illegal evidence, or taking the opinion of third persons, be alleged as a misbehavior in the arbitrators which will affect their award. If they have given their honest, incorrupt judgment on the subject-matters submitted to them, after a full and fair hearing of the parties, they are bound by it; and a court of chancery have no right to annul their award, because it thinks it could have made a better.

In fine, we are of opinion that this record furnishes no evidence of corruption or misbehavior in the arbitrators, nor of "ignorance," as charged in the bill,) or of any such mistake as would justify a court of chancery in annulling it.

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The decree of the court below is therefore reversed, and the record remitted, with directions to dismiss the bill of complaint, with costs, but without prejudice to any legal defence.

M'Lean, J., and Nelson, J., dissented.

NELSON, J. I do not agree to the judgment of the court in this case. I think the damages allowed against the complainants, by the arbitrators, are so extravagant, disproportioned, and gross, as to afford evidence of passion and prejudice, and justified the judgment of the court below, in setting aside the award. It is difficult, if not impossible, to see, upon any other ground, how between four and five thousand dollars should have been allowed against one of the firms in the submission, and but some one thousand dollars against the other, under the circumstances of the case.

18 H. 246.

MORGAN B. HINKLE, in his own Right, and as Administrator *de bonis non* of JOHN FISHER, deceased, Complainant and Appellant, v. MOSES WANZER, JAMES F. JOHNSON, and JOHN S. HUNTER.

17 H. 353.

When a debtor deposited with an attorney certain notes as security for claims against him, then in the attorney's hands, and subsequently gave verbal directions to the attorney to protect another creditor out of any balance which might remain, and the attorney gave to this last-mentioned creditor the control of a judgment recovered on one of the notes; *held*, that the creditor acquired an equitable interest in the judgment, by the direction of the debtor to the attorney, and the action of the latter thereon.

APPEAL from the circuit court of the United States for the southern district of Alabama. The case is stated in the opinion of the court.

Phillips, for the appellant.

Reverdy Johnson, and *Reverdy Johnson, Jr.*, contra.

[* 358] * DANIEL, J., delivered the opinion of the court.

The appellant, by his bill in the circuit court, alleged: That, on the 17th day of April, 1837, John Fisher and James F. Johnson, of the mercantile firm of Fisher and Johnson, were the holders and owners of a promissory note, made by Thomas Long, George D. Fisher, and the appellant, Hinkle, bearing date on the 19th of December, 1836, for the sum of \$1,520, payable twelve months from the date of said note, to William Ryan, surviving partner of the firm of Porter and Ryan, and which had been transferred, by indorsement, from Ryan to Fisher and Johnson; that this note was, by

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Fisher and Johnson on the 17th of April, 1837, together with various other notes, placed in the hands of Messrs. Gordon, Campbell, and Chandler, attorneys, for collection, as appears by the receipt of these persons, filed as an exhibit with the bill, and marked A.

That, about the 17th of April, 1837, James F. Johnson, for valuable consideration, sold and assigned all his interest in the note above mentioned, and in the firm of Fisher and Johnson, to his partner, John Fisher.

That John Fisher having departed this life in 1838, administration of his estate was duly committed to his widow, and to his brother, William P. Fisher, who, having afterwards surrendered their rights and powers, as representatives of the estate of John Fisher, administration *de bonis non* of that estate was, on the 3d of December, 1839, duly committed to the complainant, who makes *profert* of the letters of administration granted to him.

* That Messrs. Gordon, Campbell, and Chandler, the [* 359] attorneys with whom the note had been deposited, instituted a suit thereon, in the name of Moses Wanzer, as plaintiff against the makers of that note, in the circuit court of the United States for the southern district of Alabama, and, on the 11th day of April, 1839, recovered a judgment against Thomas Long and the appellant, in the name of Wanzer, for the sum of \$1,691, in damages and costs of suit.

That, after the rendition of the said judgment, the appellant was informed by Wanzer that Fisher and Johnson, or Fisher, had owed him a small sum of money, which had been fully paid off, and that he did not know why suits had been brought in his name on the said note, and on other notes mentioned in the receipt of the said attorneys; and, at the same time, further stated that he had no right, and did not pretend to have any right or interest whatsoever, in the judgment recovered in his name.

That Hunter claims a right to this judgment, upon what precise authority the appellant does not know, as he has never heard, and does not believe, that it has been ever transferred or assigned to him by Wanzer; but, on the contrary, believes and alleges that any such transfer or assignment by Wanzer has never been made.

That Hunter, as the appellant has been informed and believes, was bound as surety or indorser for Fisher and Johnson, or Fisher; but in what manner, or for what amount, if so bound, the appellant is not informed; that he does not know whether the said Hunter has paid out of his own funds any money as surety or indorser, either for Fisher or Fisher and Johnson, but, to the best of his knowledge and belief, Hunter has not paid from his own funds any money, as

surety or indorser for either, or, if he has, such payment has been fully reimbursed to him.

That, for a large portion, if not for the whole liability of said Hunter for Fisher, or Fisher and Johnson, he was secured and indemnified by a mortgage or deed of trust on real estate and slaves, which have been sold under said mortgage or deed of trust; in addition to which, there came to the hands of the said Hunter, and were collected by him, promissory notes, accounts, credits, property, and effects of Fisher and Johnson, and of the said Fisher, both before and since his death, of great value, and were appropriated by Hunter to his indemnity, as surety and indorser as aforesaid, and to an amount greatly exceeding any liability he may have incurred, as surety or indorser as aforesaid leaving the said Hunter largely indebted to the estate of said John Fisher.

[* 360] * That Thomas Long, one of the defendants, against whom, conjointly with the appellant, the judgment aforesaid was recovered, and who died some time in the year 1843, did, in the year 1841, inform the appellant that John S. Hunter having claimed of Long the amount of said judgment, it was fully paid off and discharged by Long, who showed to the appellant a statement or receipt for the amount of the judgment, in the handwriting of Hunter, with whose writing the appellant is well acquainted.

That Hunter, under the pretext of an indemnity for his liabilities for Fisher, has been permitted by the attorneys, by whom the judgment in the name of Wanzer was obtained, to assume entire control over said judgment; and, in pursuance of said permission, did, on the 2d of May, 1839, sue out a writ of *fieri facias*, and on the 10th of January, 1840, an *alias fieri facias* upon that judgment, on each of which writs a return of *nulla bona* was duly made.

That, from the date of the return upon the *alias fieri facias*, no proceeding was had upon said judgment until the 17th of September, 1849, when a *pluries fieri facias* thereupon was sued out, as the appellant charges, by the direction of John S. Hunter, and has been levied upon the property of the appellant; and, since then, a summons has been served, in virtue of the said judgment, upon John N. Smith, as a garnishee, upon the alleged ground that said Smith is a debtor to the appellant, or has property of the appellant in his possession.

That Hunter is wrongfully and oppressively, by means of the last-mentioned execution, and of the summons of the garnishee, Smith, harassing the appellant, by an effort to coerce from him the amount of the said judgment, when, in truth, nothing is due thereon, either to Wanzer or Hunter.

Upon the allegations above set forth, the prayers of the appellant are for a decree : 1. That the judgment against the appellant and Long may be decreed to have been satisfied ; or, 2. That the appellant, as administrator *de bonis non* of John Fisher, deceased, may be declared entitled to the said judgment, and the control of the same, if any thing shall be found due thereon. 3. That the said John S. Hunter and Moses Wanzer may be restrained from proceeding against the appellant, on the said judgment, and may be ordered to account for, and pay to the appellant any money they may have collected upon the said judgment. 4. That if the said Hunter shall claim the judgment as an indemnity for any liability of himself, as surety or indorser of Fisher and Johnson, or of John Fisher, he may be ordered and required to show on what debt or debts he was bound, as indorser or surety, and what portion of such debt or *debts he has paid out of his own individual funds, and [* 361] that he may be ordered to discover and account for all the property, real and personal, moneys, credits, &c., of the said Fisher and Johnson, or of the said Fisher, ever claimed, used, or received by him, for the purpose of his indemnity, as surety or indorser of Fisher and Johnson, or of Fisher individually.

The appellant, with the view of sustaining his case, and of eliciting from the appellee any disclosure which might tend to such a result, has, in his bill, propounded a number of interrogatories.

In our examination of this cause, we have deemed it necessary to consider such only of the interrogatories so propounded, as connected with and arising out of the allegations of the bill, do, by a comparison with the statements in the answer, present the true points or questions involved in this controversy.

Those questions relate : 1. To the extent of liability of the respondent, Hunter, as surety or indorser for John Fisher, and to the sufficiency or excess of the means of indemnity alleged to have been actually received by him, for losses incurred under that liability.

2. To the alleged payment by Long to Hunter, in discharge of the judgment recovered in the name of Wanzer.

3. To the fact of a transfer, either legal or equitable, of the judgment just mentioned, and to the right or authority of the attorneys, or of their principal, Fisher, to make a transfer or appropriation of that judgment.

Of the several defendants to the bill of the appellant, John S. Hunter alone answered that bill.

By the answer of Hunter is set out the assumption by him, as indorser upon bills and drafts drawn by Fisher and Johnson, under an arrangement between this firm and Messrs. Gordon, Campbell, and

Chandler, representing, as counsel and attorneys, the creditors of Fisher and Johnson, of debts to the amount of \$28,227.25.

The facts of this undertaking, and of its subsequent fulfilment by Hunter, chiefly by his individual resources, are abundantly established by the exhibition of the agreement itself; by the testimony of Messrs. Campbell and Chandler, with whom, for the benefit of the creditors, the agreement was made, and through whose hands the indorsed bills passed; by the evidence of Stodder and Jayne, to each of whom a portion of those bills was transferred, in satisfaction of debts due to them from Fisher; and also by the evidence of Barney, to whom, as the agent of the United States Bank, a much larger portion of those bills was delivered.

In addition to the liabilities set forth as above, it is proved [* 362] * by the testimony of John A. Campbell, Esq., that Hunter, on the 16th of April, 1838, by his attorneys, Gordon, Campbell, and Chandler, paid to the Bank of Columbus, upon a judgment obtained by that bank against him, the sum of \$4,818.27, which sum, ne witness was informed by Fisher, was a debt incurred by Hunter for Fisher.

The answer contains a statement purporting to be a full exhibit of the money raised by sales of the property pledged by Fisher for the indemnity of his sureties and indorsers, as well as of all other sums derived from Fisher or from his debtors, and which have been applied for Hunter's reimbursement. This statement in the answer, including the judgment against Hinkle and Long, amounts to \$16,558.28. To this statement, however, must be added the sum of \$2,200, proved by the witness, Sadler, to have been paid to Hunter, upon the compromise of a debt due from Sadler and Barnes, and also a sum of \$175, shown to have been received from a witness, Gilchrist; which sums, though derived from Fisher, are not comprised in statement in the answer. There is also exhibited in proof, in this case, a list of claims, by notes and open accounts, making an aggregate of \$2,115.83, assigned by the executor of Fisher to Hunter and Cook, attorneys; which claims, it is stated in the assignment, were intended to meet the liabilities of Hunter for said John Fisher; but of these claims, many of which were not above \$3, and resting upon open accounts, it is not in proof that any portion of them was certainly applied to Hunter's indemnity, or, indeed, was ever collected. But conceding the fact that the sum spoken of by Sadler and Gilchrist, and the entire list of claims assigned as above mentioned, were realized by Hunter, they would, when added to the sum of \$16,558.28, admitted in the answer, compose an aggregate falling far short of the liabilities which Hunter, as the indorser and surety for John Fisher,

and Fisher and Johnson, under the agreement with Gordon, Campbell, and Chandler, has actually incurred, and is proved to have satisfied. Upon a correct view, therefore, of the proofs in this cause, we are led to the conclusion, in opposition to the allegations in the bill, and in accordance with the answer and the proofs, that Fisher and Johnson, and John Fisher, who, at the time of his death, was utterly insolvent, had failed, by a large deficiency, to reimburse to Hunter the losses incurred by the latter as indorser and surety for the former.

The second question which we have mentioned as arising in this cause, namely, that of satisfaction by Long of the judgment against Long, Hinkle, and Fisher, has not been entirely free from embarrassment when tested by the rules "which govern pro- [*363] ceedings in courts of equity. Correctly viewed, however, we deem that embarrassment rather apparent than real, and such as yields necessarily under a correct interpretation of the pleadings and evidence in this cause. It has been contended, that the interrogatory propounded by the bill, as to the payment by Long to Hunter of the judgment in the name of Wanzer, and the execution by Hunter of a receipt in full discharge of that judgment, is not directly answered; that the answer as to this interrogatory is evasive, and therefore is deprived of that weight which, if directly responsive, it would require the testimony of two witnesses, or that of one witness with strong corroborating circumstances, to overthrow. Hence it is insisted, that the testimony of the single witness, Mrs. Long, swearing positively to the written discharge or receipt of the amount of the judgment, must be taken as conclusive upon the subject of payment.

The rule of proceeding in equity here appealed to, is too well established and too familiar to require the citation of authorities for its support, or even to admit of its being questioned. The proper inquiry upon the point under consideration is, to ascertain how far the requirements of that rule have been complied with.

The charge in the bill in terms is as follows: "That your orator, some time in the year 1841, was informed by Thomas Long, that he had fully paid off and satisfied to the said Hunter the amount of the said judgment; and the said Long then produced and showed to your orator a receipt or statement, in writing, signed by said John S. Hunter, whose handwriting was well known to your orator, showing that the said judgment had been so paid and satisfied by said Long."

Upon the basis of this charge is constructed and propounded the 13th interrogatory, in these words: "Did or did not the said Thomas Long, at any time or in any manner, pay, satisfy, settle, or secure to the said John S. Hunter the amount of the said judgment or any

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part thereof? Did or did not the said Hunter give or sign any receipt or statement, showing the payment, settlement, satisfaction, or securing the said judgment or any part thereof?"

Divesting this interrogatory of unnecessary verbosity and tautology, it may be remarked, that the substance or meaning of the charge in the bill, and the object of the interrogatory framed upon that charge, are made up of the alleged facts of payment by Long to Hunter, and of a written acknowledgment of such payment by the latter. The terms pay, satisfy, settle, or secure, are equipollent words, when used to express the fulfilment by Long of his liability [* 364] upon the judgment, and in * a similar sense must be understood the terms receipt and statement, when used to describe a written acknowledgment of payment by a party making or signing such acknowledgment. And here it may be remarked, that whatever may be the technical meaning and effect of the word release at law, it can hardly be doubted that a receipt or written acknowledgment of payment or settlement would be construed as a release in a court which looks rather to the substance of things than to their forms; and whose maxim is, *ut res magis valeat quam pereat*. The reply to the 13th interrogatory is, that the respondent had not received from Long any settlement, payment, or satisfaction. So far, the reply to the interrogatory falls within the literal terms of that inquiry. But it proceeds to state further, that the respondent has never released Long from his liability to satisfy the judgment, and this form of denial, it is insisted, does not exclude the execution of a written receipt such as has been alleged in the bill, and mentioned by the witness, Mary Long. We have already said that, in equity at least, a receipt for the payment of debt would be regarded as a release from further demand by the creditor; and we think that, according to the generally received acceptation of language, a creditor who, in speaking of his debtor, denies having received of him either settlement, payment, or satisfaction, and in the same statement avers that he has never released that debtor, must be understood as intending to declare that he had given him no written acknowledgment of payment, nor acquittance of any description whatsoever. The exception now urged to the answer to the 13th interrogatory, even upon the face of that response, appears to partake more of the character of a verbal criticism than of that of a fair and substantial impeachment. And we are the less inclined to extend the scope of this exception, since the complainant below, by a more timely and regular proceeding, might have obtained what he now contends for, without hazard of injury or surprise to the respondent.

We regard the answer as substantially responsive, and entitled to every legal effect incident to it as such.

With respect to the circumstances connected with this charge of payment in the bill, we think that so far as they have been disclosed, their preponderance is decidedly to the statement in the answer.

The bill admits the insolvency of Long at the period of his death. At what precise time he became insolvent is not stated. It is not probable that he became insolvent just at that period; and the widow of Long, whose testimony is relied on to establish the payment and the existence of the receipt in 1841, assigns as a reason for her knowledge of these transactions, her familiarity with her husband's embarrassments at that date.

* Alfred Harrison, in December, 1851, swears, that from [*365] the 4th of March, 1839, to the 4th of March, 1842, he was sheriff of Lowndes county, in which Long lived and died, and was also sheriff of that county at the time of his testifying. That as sheriff, he has had in his hands various executions against Long, and although some of them were for very small sums, he was never able to collect any one of them, and had returned on them, "No property."

B. Harrison, another witness, states, that from March, 1839, to March, 1842, he acted as deputy sheriff of the county of Lowndes, and from March, 1842, to March, 1845, was sheriff of that county; that, as sheriff and deputy sheriff, he had opportunities of knowing the pecuniary situation of Long, against whom the witness had held various executions, not one of which could be collected, but all of which were returned, "No property found." It should be remarked here, that the statement of these sheriffs covers the entire interval from 1839 to 1845, including the period of the alleged payment by Long, as well as that of his death. It is proper further to observe, that on the judgment now under consideration, there were sued out two writs of *feri facias*, one of them as late as January, 1840, on each of which writs was made the return of *nulla bona*. It would, we think, challenge no ordinary degree of credulity to believe, that a man in whose possession no property could be found for five years previous to his death, and who, in the case before us, had resisted to the very extreme of the law, should, during the same time, have voluntarily discharged an obligation which it is shown he was both unable and unwilling to fulfil.

The returns upon the *fi. fa.* and *alias fi. fa.* sued upon this judgment, afford a satisfactory explanation of a circumstance from which it has been endeavored to deduce a presumption unfavorable to the appellee. That circumstance is the lapse of time between the return upon the *alias* and the suing out of the *pluries fi. fa.* upon the judgment. The solution is this: the plaintiff in the judgment having

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ascertained, by two experiments, the futility of process against the defendants, was unwilling for the time being, to repeat such experiments, which were not only useless but expensive; but were, perhaps, induced subsequently to renew their efforts, by some change in the condition of parties, from which success was rendered more probable.

The remaining inquiry for consideration relates to the assignment or appropriation of the judgment, and the right or power of Fisher or his attorneys to make such appropriation for the benefit of [* 366] Hunter. The true character of the transaction, *with reference to this judgment, is disclosed in its history contained in the deposition of John A. Campbell, Esq., taken in this cause. The facts as therein narrated, are substantially these: The law firm of Gordon, Campbell, and Chandler, in the year 1837, having in their hands a very large amount of claims of the creditors of Fisher, in order to avoid being sued upon those claims, Fisher arranged a portion of them by giving the drafts specified in the answer of Hunter, and which were indorsed by Hunter. The residue of those claims he arranged by depositing various notes with the firm of Gordon, Campbell, and Chandler, to be collected by that firm, and by them to be applied in satisfaction of the debts of Fisher. Amongst the notes so deposited was that executed by Thomas Long, George D. Fisher, and the appellant, Hinkle, on which the judgment in the name of Wanzer has been obtained. And it may be in this place remarked, that in exhibit A., filed with the bill of the complainant below, and relied on by him, and which exhibit is the receipt of Gordon, Campbell, and Chandler, for the notes deposited with them by Fisher, after an enumeration of those notes, is contained in the following stipulation, namely: "The proceeds of all which notes, as they shall be collected, are to be appropriated by us to the payment of any demands we may hold against the said Fisher and Johnson, upon their own debts, and not upon indorsements or liabilities for others." Here, then, we have a contract between Fisher and Johnson and their creditors, represented by Gordon, Campbell, and Chandler, who held various claims of those creditors against Fisher and Johnson,—a contract founded on the consideration of forbearance as well as on the claims themselves, and therefore beyond the power of Fisher and Johnson to revoke or control,—constituting Messrs. Gordon, Campbell, and Chandler trustees for the creditors of Fisher and Johnson, and with full power to appropriate the funds provided for their payment.

It is probable that every one of the notes placed in the hands of Messrs. Gordon, Campbell, and Chandler, bore upon it the indorse-

ment of Fisher and Johnson, or of John Fisher; but as it is not rational to impute to these persons the design to frustrate their arrangement in the very act of making it, we must conclude that such indorsement, if made, was designed to give more complete control of these notes to the persons to whose management the notes and their proceeds were expressly intrusted. Wanzer was a creditor of Fisher, on a note for \$885.89, which note was in the hands of Gordon, Campbell, and Chandler, and was provided for and paid out of the funds or notes deposited with the firm; but it would be absurd as well as unjust to the other creditors of Fisher and Johnson, to suppose *that to this demand on behalf of Wanzer, [* 367] there was to be specifically appropriated out of the funds designed for all the creditors of Fisher, an amount equal to double that demand. This pretension, too, would contradict the explicit statements, on oath, of Messrs. Campbell and Chandler, who held and discharged the note due to Wanzer, who also recovered the judgment against Long, Fisher, and Hinkle, and who state that Wanzer's claim had been paid out of other securities of Fisher, in their hands, and that Wanzer had no interest whatsoever in the judgment rendered in his name.

Such being the history of this case, it would seem to follow that the right to the judgment against Long, Fisher, and Hinkle remained in Campbell and Chandler, to be appropriated by them under their agreement, to the creditors of Fisher, or to be so disposed of by Fisher, with their assent. Upon this view of the law, we can perceive no valid objection to the authority given by Gordon, Campbell, and Chandler, especially with Fisher's express sanction, to Hunter, the chief creditor of Fisher, to control and apply to his indemnity the judgment sought to be enjoined. No such objection, surely, can be sustained, unless it can be shown that an equitable interest cannot be assigned; a position which could rest upon no principle of justice, and which, at this day, it would be idle to attempt to sustain upon authority.

If the general indorsement by Fisher, accompanied with the delivery of the note of Long, Fisher, and Hinkle, to Gordon, Campbell, and Chandler, created in the latter an absolute legal right and property in that note, no exception could, of course, be taken to any exercise or application of the right and property so vested in them. If, on the other hand, the indorsement and delivery of the note created a trust for the benefit of the creditors of Fisher, and consequently for the benefit of Fisher himself, by his exoneration *pro tanto*, there remained in Fisher an equitable interest in the note and in the judgment rendered thereon, which he had a right, with or without the

assent of the trustees, to assign or apply in payment of his creditors; such assignment or application he has made, in coöperation with those trustees, to his principal creditor, Hunter, and this act of Fisher in his lifetime has, since his death, been sanctioned by his personal representative.

Notwithstanding the strictness, particularly in the earlier cases in the courts of common law, with respect to assignments of equitable interests and *choses in action*, the books abound with cases showing that the rule at the common law has been much relaxed, or almost disregarded, by the courts of equity, which, from a very [*368] early period, have held that assignments for valuable *consideration, of a mere possibility, are valid, and will be carried into effect upon the same principle as they enforce the performance of an agreement, when not contrary to their own rules or to public policy. In the case of *Wright v. Wright*, 1 Ves. 412, it is said by Lord Hardwicke: "That such an assignment always operates by way of agreement or contract, amounting, in the consideration of the court, to this; that one agrees with another to transfer and make good that right or interest." By the same judge it is said, in the case of *Row v. Dawson*, 1 Ves. 331, that for such an assignment no particular words are necessary, but any words are sufficient which show an intention of transferring the *chose in action* for the use of the assignee.

It has been expressly ruled, that a mere expectancy, as that of an heir at law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may become entitled under an appointment or in personal estate, as presumptive next of kin, is assignable in equity. *Hobson v. Trevor*, 2 P. Wms. 191; *Wethered v. Wethered*, 2 Sim. 183; *Smith v. Baker*, 1 Y. & Coll. 223; *Carleton v. Leighton*, 3 Mer. 671; *Hinde v. Blake*, 3 Beav. 235. The numerous authorities upon this point are collated in the second volume of *White and Tudor's Leading Cases in Equity*, in the note of the editors upon the cases of *Row v. Dawson*, and *Ryall v. Rowles*, p. 204 *et seq.* A decision which bears very directly upon the case before us is that by Sir James Wigram, vice-chancellor, of *Kirwin v. Daniel*, 5 Hare, 500, in which it was ruled, "that where a creditor, in whose behalf a stake has been deposited by the debtor with a third person, receives notice of that fact from the stakeholder, the notice will convert the stakeholder into an agent for, and debtor to, the creditor."

In the present case, Gordon, Campbell, and Chandler were put in possession, by Fisher, of funds to be applied by them to Fisher's creditors; and had, by their written agreement, undertaken so to ap-

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propriate those funds. Hunter, a principal creditor of Fisher, is, by information received both from Fisher and from Gordon, Campbell, and Chandler, made cognizant of this deposit, and of the purpose to apply it to his indemnity. He accepts the proffer made him, and claims the benefit of it. And by instructions from Fisher, both verbal and written, as is proved in this cause, those depositories were directed to apply the funds under their control (amongst those funds the judgment against Long, Fisher, and Hinkle) to the benefit and protection of Hunter. Upon this single aspect of the transaction, can it be doubted that these depositories were authorized and bound to conform *to the instructions thus given? [*369] We think that both their authority and duty so to do admit of no doubt. The decree of the circuit court, dismissing the bill of the complainant in that court, being warranted by the view we have taken of the law and the evidence in this case, we order that decree to be affirmed.

WILLIAM FONTAIN, Administrator *de bonis non cum testamento annexo* of FREDERICK KOHNE, deceased, Appellant, v. WILLIAM RAVENEL.

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A testator empowered his executors, after the death of his wife, to distribute the residue of his estate among such charitable institutions of South Carolina and Pennsylvania as they might deem most beneficial to mankind; the wife survived the executors; *held*, that even if such a power, confided to these particular persons by the testator, could be executed in England by the chancellor, it could not be by any court of the United States, and that this court could not take this residue from the next of kin.

THE case is stated in the opinion of the court.

Hopper and Meredith, for the appellant.

Gerhard and Pettigru, (with whom was *Whaley*,) contra.

* M'LEAN, J., delivered the opinion of the court. [*382]

This is an appeal in chancery, from the circuit court of the United States for the eastern district of Pennsylvania.

The case involves the construction of the will of Frederick Kohne. He first settled in Charleston, South Carolina, where he engaged in active business, and accumulated a large fortune. For many years before his death, his residence was divided between Charleston and Philadelphia. At the latter place, he added much to his wealth, in the acquisition of real and personal property. He had furnished houses in both cities, and a country house in the neighborhood of

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Philadelphia. Until his health became infirm, he resided a part of the year in the south, and the other part in the north. In May, 1829, he died in Philadelphia, where his will was made and published, in the month of April preceding his death. In his will, he declared himself to be of the city of Philadelphia.

After giving several annuities to his wife and others, and legacies to his friends in this country and in foreign countries, to charitable objects, and providing for the payment of them, he declares: "Forasmuch as there will be a surplus income of my estate, beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income, and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, in the purchase of such stocks or securities of the United States, or the State of Pennsylvania, or of any other State or States of the United States, or of the city of Philadelphia, bearing an interest, as they, in their discretion, may see fit; and from and immediately after the decease of my said wife, then all the rest, residue, and remainder of all my estate, including the fund which shall have arisen from the said surplus income aforesaid, after payment of the legacies hereinbefore directed to be paid, after the decease of my said wife, and providing for the payment of the annuities hereinbefore given, of those annuitants who may then be still living, I authorize and [* 383] empower my executors or the survivor * of them after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina, as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefits thereof." His wife, Eliza Kohne, John Bohlen, and Robert Vaux, of the city of Philadelphia, and Robert Maxwell, of the city of Charleston, were appointed executors.

Mrs. Kohne survived her co-executors some years, and then died, having made her last will and testament, and appointed James L. Petigru and William Ravenel, the defendant, executors, the latter of whom obtained letters testamentary in the county of Philadelphia. And on the 15th of October, 1852, William Fontain, the complainant, obtained letters of administration *de bonis non*, on the estate of Frederick Kohne, deceased, he being the nearest of kin to the deceased, and one of his heirs at law.

The bill is filed in the name of the complainant, by certain charitable societies of Pennsylvania and South Carolina, under the directions of the will, to recover from the defendant, as executor of Mrs. Kohne,

so much of the property as came to her hands as the executrix of her husband's will, and which she distributed, as undisposed of property, after the death of her co-executors. And the question in the case is, whether the residuary bequest in the will, which authorized his executors, or the survivor of them, after the death of his wife, to dispose of the surplus "for the use of such charitable institutions in Pennsylvania and South Carolina, as they might deem most beneficial to mankind," has lapsed, no such appointment having been made, or attempted to be made during the lifetime of the executors. This part of the property is understood to have amounted to a large sum.

The domicile of the testator, at the time of his death, seems not to be a controverted question. He had so lived in the two States of Pennsylvania and South Carolina, and amassed property in both, that his domicile might be claimed in either. There is no evidence in which, if in either, he exercised the right of suffrage. For two years previous to his death, he resided in Pennsylvania.

The bequest under consideration was intended to be a charity. The donor, having entire confidence in his executors, substituted their judgment for his own. They, or the survivor of them, was to designate such objects of his charity in the two States, "as would be most beneficial to mankind." It was to be placed on the broadest foundations of human sympathy, not *excluding [* 384] the colored race. It is no charity to give to a friend. In the books, it is said the thing given becomes a charity where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field, for the needy and passing stranger.

It may be admitted that this bequest would be executed in England. A charity rarely, if ever, fails in that country. The only question there is, whether it shall be administered by the chancellor, in the exercise of his ordinary jurisdiction, or under the sign-manual of the crown. Thus furnished with the judicial and prerogative powers, the intent of the testator, however vaguely and remotely expressed, if it be construed into a charity, effect is generally given to it. It is true, this is not always done in the spirit of the donor; for sectarian prejudices, or the arbitrary will of the king's instruments, sometimes pay little or no regard to the expressed will of the testator.

The appellants endeavor to sustain this charity under the laws of Pennsylvania. This is according to the course of the court. The case of *The Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. 1, was decided under the laws of Virginia, which had repealed the statute of 43 Elizabeth. In *Beatty v. Kurtz*, 2 Pet. 566, the pious use of a burial-ground was sustained under the bill of rights

of Maryland. The case of *Wheeler v. Smith*, 9 How. 55, was ruled under the laws of Virginia. And in the case of *Vidal v. Girard's Executors*, the laws of Pennsylvania governed.

In *Wheeler v. Smith*, this court said, when this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the *parens patriæ*.

There can be no doubt that decisions have been made in this country, on the subject of charities, under the influence of English decrees, without carefully discriminating whether they resulted from the ordinary exercise of chancery powers, or the prerogatives of the crown.

The courts of the United States cannot exercise any equity powers, except those conferred by acts of congress, and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the constitution of the United States. Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts.

[* 385] * In 2 Story's Eq. § 1189, it is said: "But as the court of chancery may also proceed in many, although not in all, cases of charities by original bill, as well as by commission under the statute of Elizabeth, the jurisdiction has become mixed in practice; that is to say, the jurisdiction of bringing informations in the name of the attorney-general, has been mixed with the jurisdiction given to the chancellor by the statute. So that it is not always easy to ascertain in what cases he acts as a judge, administering the common duties of a court of equity, and in what cases he acts as a mere delegate of the crown, administering its peculiar duties and prerogatives. And again, there is a distinction between cases of charity, where the chancellor is to act in the court of chancery, and cases where the charity is to be administered by the king, by his sign-manual. But in practice the cases have often been confounded, from similar causes."

"It is a principle in England, that the king, as *parens patriæ*, enforces public charities, where no other person is intrusted with the right. Where there is no trustee, the king, by his lord chancellor, administers the trust, as the keeper of the king's conscience; and it is not important whether the chancellor acts as the special delegate of the crown, or the king acts under the sign-manual, his discretion being guided by the chancellor."

It may be well again to state the precise question before us. "The executors, or the survivor of them, after the decease of the testator's wife, was authorized to dispose of the property, for the use of such charitable institutions in Pennsylvania and South Carolina, as they or he may deem most beneficial to mankind.

No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of Mrs. Kohne; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator rendered the appointment impossible. Had the contingency of the death of Mrs. Kohne happened, as the testator from her advanced age contemplated, during the life of the executors or the survivor of them, the appointment might have been made at his or their discretion. But had they or the survivor of them failed to make it, it might have become a question whether he or they could have been coerced to do so by the exercise of any known chancery power in this country. The will contained no provision for such a contingency, and it could not be brought under the trust of executorship. Chancery will not compel the execution of a mere naked power. 1 Story's Eq. § 169. But it will, *under [* 386] equitable circumstances, aid a defective execution of a power. A power when coupled with a trust, if not executed before the death of the trustee, at law the power is extinguished, but the trust, in chancery, is held to survive.

The testator was unwilling to give this discretion to select the objects of his bounty, except to his executors. He relied on their discrimination, their judgment, their integrity and fitness, to carry out so delicate and important a power. He made no provision for a failure, in this respect, by his executors or the survivor of them, nor for the contingency of their deaths before Mrs. Kohne's decease. They died before they had the power to appoint, and now what remains of this bequest, on which a court of chancery can act?

There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him, except the *parens patriæ*? Had he declared that the residue of his estate should be applied to certain charitable purposes, under the

statute of 43 Eliz., or on principles similar to those of the statute, effect might have been given to the bequest, as a charity, in the State of Pennsylvania. The words as to the residue of his property were used in reference to the discretion to be exercised by his executors. Without their action, he did not intend to dispose of the residue of his property.

It is argued, "that in England the chancellor, in administering charities, acts as the delegate of the crown, inasmuch as he discharges all his judicial functions in that capacity." If, by this, it is intended to assert that the chancellor, in affixing the sign-manual of the king, or when he acts under the *cy pres* power, is in the discharge of his ordinary chancery powers, it does not command our assent.

The statute of 43 Eliz., though not technically in force in Pennsylvania, yet, by common usage and constitutional recognition, the principles of the statute are acted upon in cases involving charities. *Witman v. Lex*, 17 Serg. & Rawle, 88.

In the argument, the case of *Moggridge v. Thackwell*, 7 Ves. 86, was cited, as identical with the case before us. "The only difference between that case and this one, it is said, is, that in the former the devise was for objects not defined, as they are in this case." In this the counsel are somewhat mistaken, as the case of *Moggridge* will show.

[* 387] * The devise in the will of Ann Cam was: "And I give all the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters; and I appoint the said John Maggridge and Mr. Vaston, before mentioned, executors of this my will."

In the final decree, "upon a motion to vary the minutes, Lord Thurlow declared, that the residue of the testatrix's personal estate passed by her will, and ought to go and be applied to charity," &c.

Now here was a trust created not only in Vaston, but in his executors and administrators, to whom the residue of the estate was bequeathed for the purposes of the charity. In this view, Lord Thurlow might well say, "the residue of the personal estate passed by the will." This was true, though Vaston was dead when the will took effect. This being the case, it is difficult to say that that case is identical with the one before us.

The case of *Moggridge v. Thackwell* was before Lord Eldon on a rehearing. He entered into a general view of the subject of charities, by the citation of authorities which showed the unreasonableness of the doctrine maintained by the courts, the inconsistencies in the de-

cisions in such cases, and the gross perversions of charities by the exercise of the prerogative power; but at last he says: "Therefore I rather think the decree is right. I have conversed with many upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the king by sign-manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust. But," he observes, "it must be recollected that I am called upon to reverse the decree of a predecessor, and of a predecessor who, all the reports inform us, had great occasion to consider this subject. I should hesitate with reference to that circumstance; but where authority meets authority, and precedent clashes with precedent, I doubt whether I could make a decree more satisfactory to my own mind than that which has been made."

It will be perceived that this decision was made reluctantly, and after much balancing of the law and the force of precedents, and chiefly, as it would seem, in respect to the decree of Lord Thurlow. This decision of Lord Eldon was made in 1802, and it is not known to have been recognized in this country.

* Neither the doctrines on which this decision is founded, [* 388] nor the doubts expressed by the chancellor, are calculated very strongly to recommend it to judicial consideration. The case, however, is different from the one before us, in this: the residuary estate of Mrs. Cam passed to the trustee; that of Mr. Kohne remained as a part of his estate in the hands of the executors, and descended to his heirs at law on the death of Mrs. Kohne. The beneficiaries were not more definitely described in the one case than in the other. In Kohne's case no trust was created, except that which was connected with the executorship.

Where there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of his estate. To meet such cases, and others, the prerogative power of the king, in England, has been invoked, and he, through the chancellor, gives effect to the charity.

It would be curious, as well as instructive, on a proper occasion, to consider the principles, if principles they can be called, which were

first applied in England to charities. Their most learned chancellors express themselves, in some degree, as ignorant on this subject. Lord Eldon said, in the case of *Maggridge*, "in what the doctrine originated, whether, as Lord Thurlow supposed, in the principles of the civil law, as applied to charities, or in the religious notions entertained formerly in this country, I know not; but we all know there was a period when a portion of the residue of every man's estate was appropriated to charity, and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator."

In the above case, Lord Eldon again says: In *Clifford v. Francis*, this doctrine is laid down: that when money is given to charity without expressing what charity, there the king is the disposer of the charity; and a bill ought to be preferred in the attorney-general's name. I cite this (he says) to show that it contains a doctrine precisely the same as the *Attorney-General v. Syderfin*, and the *Attorney-General v. Matthews*. So those three cases (he says) seemed to have established, in the year 1679, that the doctrine of this court was, that where the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of, not by a scheme before the master, but by the king, the disposer of such charities, in his character of *parens patriæ*.

[*389] * Some late decisions in England, involving charities evince a disposition rather to restrict than to enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a king or chancellor, or both, leads to uncertainty and injustice.

In a late case of *Clark v. Taylor*, 21 Eng. Law and Eq. 308, a gift, by will, to a particular charitable institution maintained voluntarily by private means, the particular intention having ceased; held, "that the gift was not to be disposed of as a charitable gift *cy pres*, but failed and fell into the residue."

In the case of *The Baptist Association*, Chief Justice Marshall says, there can be no doubt that the power of the crown to superintend and enforce charities existed in very early times; and there is much "difficulty in marking the extent of this branch of the royal prerogative before the statute. That it is a branch of prerogative, and not a part of the ordinary powers of the chancellor, is sufficiently certain." And in the case of *The Attorney-General v. Flood*, Hayne, 630, it is said, "the court of chancery has always exercised jurisdiction in matters of charity derived from the crown as *parens patriæ*."

In the provisions of the act of Pennsylvania defining the powers of a

court of chancery, in 1836, it is declared, "that in every case in which any court, as aforesaid, shall exercise any of the powers of a court of chancery, the same shall be exercised according to the practice in equity, prescribed or adopted by the supreme court of the United States."

In June, 1840, an act extended the jurisdiction of the supreme court within the city and county of Philadelphia, in chancery, in cases of "fraud, accident, mistake, or account;" and since then an act has been passed giving the orphans' court power where a vacancy exists in a trust to fill it, and also to dismiss trustees, executors, &c., for abuse of their trusts, &c. But no statutory provision is found embracing the case before us.

The chancery powers are of comparatively recent establishment in the State of Pennsylvania, and it does not appear that the *cy pres* power is given, and in the exercise of jurisdiction it seems to be disclaimed.

In *King v. Rundle*, 15 Barb. 139, there being a number of charitable bequests to several charitable bodies, the remainder was bequeathed or devised to the Protestant Episcopal society, for certain purposes, &c.; the bequests to the religious bodies were held invalid, and so of the remainder over, as not being statutory tests. In *Yates v. Yates*, 9 Barb. 324, the court say: "We come to the conclusion that, as a court of equity, we possess no original inherent jurisdiction, to enforce the execution of a charitable trust void in law, as contravening the * statute against perpetuities, [*390] as being authorized. In this case, where the use is a pious one, additional reasons might be urged against the exercise of such jurisdiction, were it important. Unless this trust will stand the statutory test to be applied to it, it must fall.

In the will of Sarah Zane, Mr. Justice Baldwin, sitting in Pennsylvania, and speaking of trustees, says: "They will be considered as trustees, acting under the supervision of this court, as a court of chancery, with the same powers over trusts as courts of equity in England, and the courts of this State profess and exercise." "When the fund shall be so ascertained as to be capable of a final distribution, it will be directed to be applied exclusively to the objects designated in the will, as they existed at the time of her death, and shall continue until a final decree; if any shall then appear to have become extinct, the portion bequeathed to such object must fall into the residuary fund as a lapsed legacy. Its appointment to other purposes or *cestuis que trust* than those which can, by equitable construction, be brought within the intention of the will of the donor, is an exercise of that branch of the jurisdiction of the chancellor of England which has been

conferred on this court by no law, and cannot be exercised, *virtute officii*, under our forms of government."

And again, in *Wright v. Linn*, 9 Barr, 433, Bell, J., says: "Though the statute of 43 Eliz. c. 4, relating to charitable uses, has not, in terms, been recognized as extending to Pennsylvania, we have adopted, not only the principles that properly emanate from it, but, with perhaps the single exception of *cy pres*, those which, by an exceedingly liberal construction, the English courts have ingrafted upon it."

In *The Methodist Church v. Remington*, 1 Watts, 226, the court says: "The original trust, though void, was not a superstitious one; nor if it were, would the property, as in England, revert to the State for the purpose of being appropriated *in eadem genera*, as no court here possesses the specific power necessary to give effect to the principle of *cy pres*, even were the principle itself not too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment."

In *Ray v. Adams*, 3 Mylne & Keen, 237, it was held: "That where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the court; but if, in the events which happen, the intended trustee dies before the time arrives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate."

[*391] * In the case of *Ommanney v. Butcher*, 1 Turn. & Russ. 260, a testator concluded his will, "in case there is any money remaining, I should wish it to be given in private charity." Held, "if the testator meant to create a trust, and the trust is not effectually created, or fails, the next of kin must take."

There appears to be no law or usage in South Carolina that can materially affect the question under consideration. It seems to be conceded that if this charity cannot be administered by this court, in the State of Pennsylvania, it cannot be made available by the laws of South Carolina.

After the investigation we have been able to give to this important case, embracing the English chancery decisions on charities, as well as our own, and the cases decided in Pennsylvania, we are not satisfied that the fund in question ought to be withdrawn from those who are in possession of it, as the heirs of Frederick Kohne. There does not appear to us to be any safe and established principle, in Pennsylvania, which, under the circumstances, enables a court of chancery to administer the fund. It has not fallen back into the estate of the testator, because it was not separated from it. It remains unaffected by the bequest, because the means through which it was to be given

and applied have failed. The decree of the circuit court is, therefore, affirmed.

Taney, C. J., and Daniel, J., concurred in the judgment of the court, but dissented from the reasoning. Their opinions were as follows:—

TANEY, C. J. I concur in the judgment of the court. But I do not, for myself, desire to express an opinion upon either the law of Pennsylvania or of South Carolina, in relation to charitable bequests. For, assuming every thing to be true that is stated in the complainant's bill, and that the bequest is valid by the laws of Pennsylvania, and would be carried into execution by the tribunals of the State, yet I think the circuit court of the United States had not jurisdiction to establish and enforce it; and was right, therefore, in dismissing the bill. I propose to show very briefly, the grounds on which this opinion is formed.

Undoubtedly, a charitable bequest of this description would be maintained in the English court of chancery. The death of the executors, in the lifetime of the widow, would make no difference. The bequest would still be good against the heirs or representatives of the testator, and the fund applied to charitable purposes, according to a scheme approved by the chancellor, or authorized under the sign-manual of the king.

* But the power which the chancellor exercises over donations to charitable uses, so far as it differs from the power he exercises in other cases of trust, does not belong to the court of chancery as a court of equity, nor is it a part of its judicial power and jurisdiction. It is a branch of the prerogative power of the king as *parens patriæ*, which he exercises by the chancellor.

Blackstone in his Commentaries, 3d vol. 47, enumerating what he states to be the extraordinary powers of the chancellor, says: "He is the general guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable uses in the kingdom; and all this over and above the vast and extensive jurisdiction which he exercises in his judicial capacity in the court of chancery." And in the same volume, page 437, he says: "The king, as *parens patriæ*, has the general superintendence of all charities, which he exercises by the keeper of his conscience, the chancellor; and, therefore, whenever it is necessary, the attorney-general, at the relation of some informant, files an *ex officio* information in the court of chancery to have the charity properly established."

So, too, Cooper, in his chapter on the jurisdiction of the court,

says : " The jurisdiction, however, in the three cases of infants, idiots, or lunatics and charities, does not belong to the court of chancery as a court of equity, but as administering the prerogative and duties of the crown."

And in the case of *The Baptist Association v. Hart's Executors*, 4 Wheat. 1, this court, after examining many English authorities upon the subject, affirm the same doctrine. And Chief Justice Marshall, who delivered the opinion of the court, expresses it in the following strong and decisive language (p. 48) : —

" It would be a waste of time," says the chief justice, " to multiply authorities to this point, because the principle is familiar to the profession. It is impossible to look into the subject without perceiving and admitting it. Its extent may be less obvious.

" We now find," he continues, " this prerogative employed in enforcing donations to charitable uses, which would not be valid if made to other uses ; in applying them to different objects than those designated by the donor, and in supplying all defects in the instrument by which the donation is conveyed, or in that by which it is administered."

Resting my opinion upon the English authorities above referred to, and upon the emphatic language just quoted from the decision of this court, I think I may safely conclude that the power exercised [* 393] by the English court of chancery " in enforcing donations to charitable uses, which would not be valid if made to other uses," is not a part of its jurisdiction as a court of equity, but a prerogative power exercised by that court.

It remains to inquire whether the constitution has conferred this prerogative power on the courts of equity of the United States.

The 2d section of the 3d article of the constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power, and nothing more ; and cannot, upon any fair construction, be held to embrace the prerogative powers, which the king, as *parens patriæ*, in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the constitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants, lunatics, or idiots, or charities, has not been conferred.

These prerogative powers, which belong to the sovereign as *parens patriæ*, remain with the States. They may legalize charitable bequests within their own respective dominions, to the extent to which the law upon that subject has been carried in England ; and they may

require any tribunal of the State, which they think proper to select for that purpose, to establish such charities, and to carry them into execution. But state laws will not authorize the courts of the United States to exercise any power that is not in its nature judicial; nor can they confer on them the prerogative powers over minors, idiots, and lunatics, or charities, which the English chancellor possesses. Nobody will for a moment suppose that a court of equity of the United States could, in virtue of a state law, take upon itself the guardianship over all the minors, idiots, or lunatics in the State. Yet these powers in the English chancellor stand upon the same ground, and are derived from the same authority, as its power in cases of charitable bequests.

State laws cannot enlarge the powers of the courts of the United States beyond the limits marked out by the constitution. It is true that the courts of chancery of the United States, in administering the law of a State, may sometimes be called on to exercise powers which do not belong to courts of equity in England. And, in such cases, if the power is judicial in its character, and capable of being regulated by the established rules and principles of a court of equity, there can be no good objection to its exercise. It falls within the just interpretation *of the grant in the constitution. [* 394] But, beyond this, the state laws can confer no jurisdiction on the courts of equity of the United States.

In the cases in relation to charities which have come before this court, there has been a good deal of discussion upon the question, whether the power of the chancery court of England was derived from 43 Elizabeth, or was exercised by the court before that act was passed. And there has been a diversity of opinion upon this subject in England, as well as in this country. In the case of the Baptist Association v. Hart's Executors, Chief Justice Marshall, who delivered the opinion of the court, *vide* 4 Wheat. 49, and Mr. Justice Story, who wrote out his own opinion, and afterwards published it in the appendix to 3 Pet. Rep. *vide* p. 497, were both at that time of opinion that it was derived from the statute. But in Vidal v. Girard's Executors, 2 How. 127, Mr. Justice Story changed his opinion, chiefly upon the authority of cases found in the old English records, which had been printed a short time before by the commissioners on public records in England. It appeared from these records that the power had been exercised in many cases long before the statute was passed.

But this circumstance does not affect the question I am now considering; for, whether exercised before or not, yet, whenever exercised, it was in virtue of the prerogative power, and not as a part of

the jurisdiction of the court as a court of equity. The statute conferred no new prerogative on the crown. And Lord Redesdale, 1 Bligh. 347, while he held that the power existed in the chancellor before the statute, and had been frequently exercised, declares it to be a prerogative power, and says: "The king, as *parens patriæ*, has a right by his proper officer, the attorney-general, to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases."

Besides, if it could be shown that at some remote period of time the court of chancery exercised this power as a part of its ordinary jurisdiction as a court of equity, it would not influence the construction of the words used in the constitution. For at the time that instrument was adopted, it was universally admitted by the jurists in England and in this country, as will appear by the references above made, that this extraordinary and unregulated power in relation to charities was not judicial, and did not belong to the court as a court of equity. The constitution of the United States, as I have before said, grants only judicial power at law and in equity to its courts; that is, the powers at that time understood and exercised as judicial, in [*395] the * courts of common law and equity in England. And it must be construed according to the meaning which the words used conveyed at the time of its adoption; and the grant of power cannot be enlarged by resorting to a jurisdiction which the court of chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the constitution was adopted.

Cases may arise in a circuit court of the United States, in which it would be necessary to decide whether the English doctrine, as to charities, was founded on the statute, or was a part of the law of England before the statute was passed. And in a suit by an heir or representative of the testator, (authorized from his place of residence to sue in a court of the United States,) to recover property or money bequeathed to a charity, the court must of necessity examine whether the bequest was valid or not by the laws of the State, and barred the claim of the heir or representative. And if in such a case it appeared that the State had not adopted the statute, it would be necessary to inquire whether the law in relation to these bequests was a part of the common law before the statute, and administered as such by the English court of chancery, and whether it had been adopted by the State as a part of its common law. For the prerogative powers of the English crown in relation to minors, idiots, or lunatics, and

charities, are a part of the common law of England; and the people of any State, who deemed it proper to do so, might vest these powers in the courts of the State.

Such an inquiry was necessary in the case of *Vidal v. Girard's Executors*, and of *Wheeler v. Smith*. But the question of jurisdiction is a very different one when a court of the United States is called upon to execute the duties of the sovereignty of the State, and to take upon itself the discretionary powers which, if they exist at all by its common law or statutes, belong to the official representatives of the *parens patriæ*, that is, the state sovereignty. And in the case of *The Baptist Association v. Hart*, although the court did not expressly deny its jurisdiction to establish the charity, if it had been valid by the laws of Virginia, yet it expressed its doubts upon the subject, saying that the question could only arise where the attorney-general was a party.

For these reasons a court of chancery of the United States must, in my opinion, deal with bequests and trusts for charity as they deal with bequests and trusts for other lawful purposes; and decide them upon the same principles and by the same rules. And * if the object to be benefited is so indefinite and so vaguely [* 396] described, that the bequest could not be supported in the case of an ordinary trust, it cannot be established in a court of the United States upon the ground that it is a charity. And if, from any cause, the *cestui que trust*, in an ordinary case of trust, would be incapable of maintaining a suit in equity to establish his claim, the same rule must be applied where charity is the object, and the complainant claims to be recognized as one of its beneficiaries.

I concur, therefore, in affirming the judgment of the circuit court, dismissing the bill; but I concur upon the ground that the court had no jurisdiction of the case stated by the complainant, and express no opinion as to the validity or invalidity of this bequest, whether in this respect it be governed by the laws of Pennsylvania or of South Carolina.

DANIEL, J. Whilst I concur in the decision of this court, in affirming the decree of the circuit court dismissing the bill of the appellants, in portions of the argument by which this court have come to their conclusion, I cannot concur. In expressing my dissent, I shall not follow the protracted argument throughout its entire length; my purpose is chiefly, to free myself on any future occasion from the trammels of an assent, either expressed or implied, to what are deemed by me the untenable, and in this case, the irrelevant positions, which that argument propounds.

I readily admit that the courts of chancery of the United States are vested with no prerogative power, can exercise no power or function similar to those derived to the lord chancellor in England, either by commission under the sign-manual of the king, as *parens patriæ*, or in the application of the often abused and oppressive doctrine of *cy pres*, or in virtue of the provisions of the statute of 43 Elizabeth. But this concession, taken in its broadest extent, by no means establishes the inference that the court of chancery in England, as a court of equity, by virtue of its inherent, and, if I may so speak, constitutional powers, apart from the prerogative and apart from the statute of Elizabeth, could not take jurisdiction of trusts, either in the establishment or maintenance of those trusts, because they expressed or implied a charitable end or purpose, or because the charitable objects were not defined with perfect precision. And if such a power inhered and existed constitutionally in the court of chancery in England as a court of equity, does it not follow, *ex consequenti*, that, the constitution and laws of the United States, constituting the courts of equity of the United States with express [* 397] reference to the character and *functions of the court of chancery as a court of equity in England, have conferred upon the former the regular inherent powers of the latter?

Much of the learned and elaborate opinion of this court, delivered by the late Justice Story, in the case of *Vidal et al. v. Girard's Executors*, 2 How. 127, nay, the great end and stress of that opinion, as correctly apprehended, consisted in the maintenance of the position that, apart from the prerogative power with which the lord chancellor was clothed, and independently of the statute of Elizabeth, and long anterior to the enactment of that statute, wherever there was a devise or bequest to a person, natural or artificial, capable of taking, and a beneficiary under the devise or bequest sufficiently certain and defined to be made the recipient of such a gift, the court of chancery, in the exercise of its regular and inherent jurisdiction, as a court of equity in relation to trusts, one of the great heads of equity jurisdiction, would establish and protect such devise or bequest, even in cases where the objects thereof were somewhat vague in their character, and although such devise contained a charity. To this express point, too, are the numerous decisions produced by the industry of the learned and able and distinguished counsel for the devisee, as the result of the researches made in the records of the chancery court, by a commission created under the authority of the British parliament. Indeed, the decision of this court in the case of *Vidal v. Girard's Executors*, would seem to be incomprehensible and without purpose, unless interpreted as asserting and maintaining, both upon reason

and authority, the regular jurisdiction of equity over devises, wherever the devisee was capable of taking, and the beneficiaries were sufficiently defined to render the directions of the testator practicable, although these directions declared or implied a charity.

It is somewhat curious to observe that the opinion of Lord Redesdale, in the case of *The Attorney-General v. The Mayor of Dublin*, 1 Bligh. 312, is appealed to in support of the doctrine now promulged, when that same case is avouched and relied on in the case of *Vidal v. Girard's Executors*, in support of the legitimate and regular powers of the courts of equity. This application of the language of Lord Redesdale would seem to grow out of the simple fact, that, in the case before him, the attorney-general was a party. But what is the declaration of his lordship, in reference to the powers of a court of equity over subjects like the one under his consideration? After denying that the statute of Elizabeth created any new law, and asserting that it only created a jurisdiction merely ancillary to that previously existing in the chancery court, he observes that

* the proceedings under that commission were still subject [* 398] to appeal to the lord chancellor, and he might reverse or affirm what had been done, or make such order as he might think fit, reserving the controlling jurisdiction of the court of chancery as it existed before the statute. He then continues, as pointing out a different mode of effecting the same objects, and from a different source of power, to declare, that the same thing might be done by the attorney-general, by information, in virtue of the prerogative.

So, too, it is affirmed by this court, *nemine contradicente*, in the case of *Vidal v. Girard's Executors*, that Lord Chancellor Sugden, in the case of *The Incorporated Society v. Richards*, 1 Drury and Warren, 258, upon a full survey of all the authorities where the point was directly before him, held the same doctrine as Lord Redesdale; and expressly decided that there was an inherent jurisdiction in equity in cases of charity, anterior to, and independently of the statute of Elizabeth.

Upon a just understanding of the opinion of the court, in the case of *Vidal v. Girard's Executors*, and of the interpretation given, in that opinion, to the English authorities relied on, it seems impossible to escape from the conclusions, that devises to persons capable of taking, in trust for beneficiaries sufficiently defined, and for purposes neither illegal nor immoral, and where there exist no objections to parties such as would exclude the jurisdiction of the courts in other cases, the courts of the United States, as courts of equity, in the exercise of regular, inherent, equity powers, in relation to trusts, will sustain and enforce such devises. These conclusions seem to follow

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inevitably from the ruling of this court in the case of *Vidal v. Girard's Executors*. Indeed, they seem to be comprised within the literal terms of that decision; and the decision now made seems to me incomprehensible, unless understood as designed to overrule that case, and every authority from the English chancery cited and commented upon in its support. For such an assault upon the previous decision of this court, wielding a blow so trenchant and fatal at one great and acknowledged head of equity jurisprudence, the head of trusts, my mind is not prepared.

There is a principle, and, in my opinion, the correct principle, on which the decision of this court may be placed, without the innovation which is objected to. It is that on which my concurrence in the decree of this court is founded, and one, too, which steers entirely clear of what is by me deemed exceptionable. That principle is this: That, by the will of Frederick Kohne, the devisees in trust were clothed with a merely naked power, to be exercised by them [* 399] as the special and *exclusive depositories of the testator's confidence, and that power to be dependent on conditions upon which, and on which alone, they should have authority to act. In the progress of events to which the devise was necessarily incident, the powers created and to be executed by the devisees in trust, have become impracticable and void. These depositories of the testator's confidence are all dead. The conditions on which their powers were made dependent, never did occur, and can, by no possibility, ever occur. It follows, therefore, that, in conformity with the will, there is no person who can act, and no subject to be acted upon, and no beneficiaries of the contemplated action. My opinion, therefore, is, that the devise has lapsed, or, rather, that no right ever came into existence under it; that nothing was ever passed by it from the estate, which descends, of course, to the testator's heirs.

SEBRA M. BOGART, WILLIAM J. WILCOX, and LEONARD F. FITCH,
Libellants and Appellants, v. THE STEAMBOAT JOHN JAY, her
Tackle, &c. GEORGE LOGAN, Claimant.

17 H. 399.

There is not jurisdiction in admiralty to foreclose a mortgage of a vessel by a sale, or by transfer of the possession to the mortgagee.

APPEAL from the circuit court of the United States for the southern district of New York. The case is stated in the opinion of the court.

Johnson, for the appellants.

Cutting, with whom was *Byrne*, contra.

WAYNE, J., delivered the opinion of the court.

[* 400]

We will confine ourselves, in this opinion, to the inquiry, whether or not a court of admiralty has jurisdiction to decree the sale of a ship for an unpaid mortgage, or can, on that account, declare a ship to be the property of the mortgagees, and direct the possession of her to be given to them. The questions of pleading made in the case, and the other points argued, we shall not notice. The conclusion at which we have arrived makes that unnecessary.

The libellants were the owners of the steamer John Jay. They sold her to Joseph McMurray for the sum of \$6,000 ; \$1,000 in cash, and the residue of \$5,000 upon a credit, for which promissory notes were given, payable to their order, in three, six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months. On the day of sale, McMurray, the purchaser, executed in a single deed, containing the whole contract between himself and the libellants, a transfer of the boat to the latter as a security for the payment of his notes, with the proviso, " that this instrument is intended to operate only as a mortgage to secure the full and just payment of the eight promissory notes given in consideration of the purchase-money of said vessel or steamboat." McMurray failed to pay the second note. Upon such failure the libel was filed. The libellants set out the contract;

* allege that it was to operate as a mortgage to secure the [* 401] payment of McMurray's notes ; state his failure to pay the second note ; claim, in the fifth article of their libel, that McMurray's failure to pay had revested them with the title to the boat, and that McMurray's had become forfeited, from his non-compliance with the condition contained in the contract of sale. Their prayer is, that they may have a decree for the amount of the unpaid purchase-money, with interest and costs, and that The John Jay and her equipments may be condemned to pay the same. Afterwards, upon their appeal in the circuit court, they moved to amend their libel by inserting the words, " or that the steamboat John Jay may be decreed to be their property, and the possession be directed to be delivered to them."

To this libel, George Logan, by way of answer, put in a claim of ownership of The John Jay, by a *bonâ fide* purchase from McMurray ; and he further denies the jurisdiction of the court, upon the ground that the contract between the libellants and McMurray was not maritime, or a case of admiralty and maritime jurisdiction. It appears that McMurray had received the possession of the boat ; that she had

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been enrolled at the custom-house in his name ; that he first sold one fourth of her to Logan, and afterwards, on the 2d December, executed a bill of sale for the whole of her to Logan, which was recorded in the custom-house ; and that thereupon The John Jay was enrolled and licensed in the name of Logan.

Upon the hearing of the cause in the district court, the libel was dismissed. It was carried, by appeal, to the circuit court, and the judgment of the district court having been affirmed, it is now here upon appeal from the circuit court. We think that the affirmance of the judgment of the district court was right, and will here briefly give our reasons for that opinion.

It has been repeatedly decided in the admiralty and common-law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of *The Neptune*, 3 Hagg. Adm. Rep. 132, Sir John Nicholl, in giving his judgment, observes : " Now, upon questions of mortgage, the court of admiralty has no jurisdiction ; whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, the decision of these questions belongs to other courts ; they are not within the jurisdiction or province [* 402] * of the courts of admiralty, which never decides on questions of property between the mortgagee and owner."

This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make the performance of the mortgagor's undertaking more certain ; and, whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, anything maritime in it. A failure to perform such a contract cannot make it maritime. A debt, secured by the mortgage of a ship,

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does not give the ownership of it to the mortgagee. He may use the legal title to make the ship available for its payment. A legal title passes conditionally to the mortgagee. Where there has been a failure to pay, he cannot take the ship *manu forti*, but he must resort either to a court of equity or to statutory remedies for the same purpose when they exist, to bar the mortgagor's right of redemption by a foreclosure, which is to operate at such time afterward, when there shall be a foreclosure without a sale, as the circumstances of the case may make it equitable to allow. Indeed, after a final order of foreclosure has been signed and enrolled, and the time fixed by it for the payment of the money has passed, the decree may be opened to give further time, if there are circumstances to make it equitable to do so, with an ability in the mortgagor to make prompt payment. *Thornhill v. Manning*, 7 Eng. Rep. 97, 99, 100.

Courts of admiralty have always taken the same view of a mortgage of a ship, and of the remedies for the enforcement of them, that courts of chancery have done of such a mortgage and of any other mortgaged chattel. But, from the organization of the former, and its modes of proceeding, they cannot secure to the parties to such a mortgage the remedies and protection which they have in a court of chancery. They have, therefore, never taken jurisdiction of such a contract, to enforce its payment, or by a possessory action to try the title, or a right to the possession of a ship. It is true that the policy of commerce and its exigencies in England, have given to its admiralty courts * a more ample jurisdiction in respect [* 403 , to mortgages of ships, than they had under its former rule, as that has been given in this opinion. But this enlarged cognizance of mortgages of ships has been given there by statute 3 and 4 Vict. c. 65. Until that shall be done in the United States, by congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been. We affirm the decree of the court below.

19 H. 289; 20 H. 393.

EDWARD M. WEST, Plaintiff in Error, v. JOSEPH COCHRAN.¹

17 H. 403.

Under the act of March 3, 1807, (2 Stats. at Large, 440,) a claimant of land in Missouri obtained no title to any particular tract, simply by a decision of commissioners that he had a title to an unlocated tract. A survey was necessary, in order to designate the land to which his title should attach.

ERROR to the circuit court of the United States for the district of Missouri. The case is stated in the opinion of the court.

¹ Mr. JUSTICE WAYNE, having been indisposed, did not sit in this cause.

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Blair and Ewing, for the plaintiff.

Hill and Cushing, (attorney-general,) *contra*.

[* 408] * CATRON, J., delivered the opinion of the court.

To understand the application of the instruction given to the jury which controlled the verdict in this case, a minute statement of the facts is necessary.

On the 1st June, 1794, Joseph Brazeau, by petition, requested the lieutenant governor of Upper Louisiana to grant to him a tract of land near to the then village of St. Louis, "situated beyond the foot of the mound called the Grange de Terre, four arpens in width, which are to extend from the steep bank or beach of the Mississippi in the W. $\frac{1}{4}$ S. W. by about twenty arpens in depth, that shall begin at the foot of the hill where stands the Grange de Terre, ascending in a N. N. W. course to the vicinity of the Stony Creek, so that the said tract hereby asked for be bounded on the east by the bank of the Mississippi, on the other side in part by the king's domain, and in part by land reunited to the said domain."

The grant was made by the governor in the following terms:

[* 409] "We do certify to have put Joseph Brazeau in possession of * the parcel of land designated in his petition, of four arpens by twenty deep, which shall extend in a N. N. W. course from the foot of the hill where stands the Grange de Terre, ascending to the vicinity of the Stony Creek, bounded on one side by the bank of the Mississippi, and on the opposite side by lands not conceded or reunited to his majesty's domain, and at the two ends bounded on the N. N. W. by the vicinity of the Rocky Creek, and at the other, in the S. S. E., shall be bounded by the land granted to the free mulattress Esther." This concession was made June 10, 1794.

On the 25th of the same month, the governor amended his former concession, in which he declares that the four arpens front by twenty deep, "shall begin beyond the mound called La Grange de Terre, extending N. N. W. to the vicinity of the Rocky Branch, bounded on one side by the banks of the Mississippi River, and on the opposite side by lands reunited to the king's domain, through which lands passes this present concession, of which one end is to be bounded by the concession of the free mulattress Esther."

The application of Esther above referred to, was made October 2, 1793. She petitioned for a piece of land lying on the borders of the Mississippi; the northern portion of the concession to be situate between the small mound called the Grange de Terre and the beach of the Mississippi, having at its two extremities four arpens front, that

shall bear about from E. N. E. to W. S. W., by twenty arpens in extent or depth, that shall run from about N. N. W. to S. S. E.

On the 3d October, 1793, the governor granted the land to Esther, in the terms of her petition, with this addition : That the land should descend the river, and be limited on three sides by the king's domain and on the other side by the bank of the Mississippi, as shown by the plat on the back of the concession. This plat was a rude sketch, affording no material aid in locating the land.

On the 5th of October, 1793, the governor certifies that he had in person put Esther in possession of the land granted, the locality of which he again describes, in the terms as above set forth, except that he declares that the eastern boundary on the river shall be limited by the edge of the beach.

Esther's concession was not surveyed by the Spanish authorities

On the 9th of May, 1798, Joseph Brazeau sold to Louis Labeaume part of the land granted to Brazeau in June, 1794, reserving for himself four arpens to be taken at the foot of the mound on the south part of the concession ; Brazeau selling only sixteen arpens in depth to Labeaume, who accepted the sale with this [* 410] reservation. In 1799, Labeaume applied to the governor to enlarge his tract acquired from Brazeau. " He asks that you will be pleased to grant him 360 arpens of land, including the land which he the petitioner bought of M. Brazeau ; that is, twenty arpens in depth from the Mississippi in ascending the Rocky Branch, W. $\frac{1}{4}$ S. by sixteen arpens in front along the Mississippi, to be taken from the descending road into the creek ; which is the same front of the petitioner's land, the angle (triangle) formed by the perpendicular from the road to the river by the creek, and by the river shall complete, or about the tract asked for."

In February, 1799, the governor granted the land to Labeaume, with the boundaries asked for, and ordered that Soulard, the surveyor, should put Labeaume into possession, and execute a survey to serve the interested party, to obtain a complete title from the governor general, which was wished for by the petitioner.

On the 20th March, 1799, Soulard proceeded to survey the land granted to Labeaume, from which the larger quantity of 374 arpens was found to be within the boundaries described in Labeaume's petition. The survey was regularly certified, April 10, 1799, and accompanied by a figurative plat.

The line marks of this survey have been retraced in the survey recently made by the United States, and the patent to Labeaume or his legal representatives, of the 25th of March, 1852, is founded on it. But it is insisted that the survey includes the sixteen arpens

reserved by Brazeau in his deed of May, 1798, to Labeaume; and on the existence of this fact the title of the plaintiff in the present controversy depends, as the land demanded lies within the bounds of the patent. Labeaume filed his title papers with the recorder of land titles, to be registered in February, 1806; and in his notice of claim, the tract partly in dispute is thus described: "Louis Labeaume, 374 arpens of land, conceded in part to Joseph Brazeau, the 20th June, 1794, and the other part to Louis Labeaume, the 15th February, 1799, settled and cultivated since both these dates."

On the 3d of September, 1806, the board of commissioners appointed to adjudicate claims to lands under the act of 1805,¹ passed on Labeaume's claim. The clerk of the board gives a description of it in these terms: "Louis Labeaume claiming 374 arpens of land situate on the Mississippi, a distance of about two miles from the town of St. Louis, produces a concession (duly registered) from Zenon Trudeau, for four by twenty arpens, dated the 20th June, 1798, (25th June, 1794,) granted to one Joseph Brazeau, and another concession from said Zenon Trudeau to claimant, for the said [* 411] 374 arpens, including the said *four by twenty arpens, dated the 15th February, 1799; a survey of the same taken the 2d March, and certified the 10th April, 1799, together with a certificate by Zenon Trudeau of the sale of the said four by twenty arpens by said Joseph Brazeau, reserving to himself four arpens in superficies; said certificate dated the 12th May, 1798."

This entry is so confused as to be unmeaning without reference to the title papers of record. The board at that time rejected the claim because the concession had not been duly registered.

On the 22d September, 1810, the board confirmed the claim in the following terms: "Louis Labeaume claims three hundred and seventy four arpens of land. See book No. 1, p. 517. The board confirm to Louis Labeaume three hundred and fifty-six arpens, and four arpens to Joseph Brazeau, and order that the same be surveyed agreeably to a concession from Zenon Trudeau to Louis Labeaume, and, as respects the four arpens, agreeably to a reserve made in a sale from Joseph Brazeau to said Louis Labeaume, recorded in book C, p. 339, in the recorder's office."

On the 14th of June, 1811, the board ordered both tracts to be surveyed at the expense of the United States, and to this end gave the following certificates to the parties respectively: —

"Commissioners' Certificate, No. 982, June 14, 1811.

"We, the undersigned commissioners for adjusting the titles to

¹ 2 Stats. at Large, 324.

lands in the territory of Louisiana, have decided that Louis Labeaume, original claimant, is entitled to a patent under the provisions of the fourth section of an act of congress of the United States, entitled 'An act respecting claims to lands in the territories of Orleans and Louisiana,' passed the third day of March, one thousand eight hundred and seven, for three hundred and fifty six arpens of land, situate in the district of St. Louis, on the Mississippi, and order that the same be surveyed agreeably to a concession from Zenon Trudeau to Louis Labeaume, recorded in book C., page three hundred and thirty nine of the recorder's office, by virtue of a concession or order of survey from Zenon Trudeau, lieutenant-governor." Signed by the commissioners.

"Commissioners' Certificate, No. 983, June 14, 1811.

"We, the undersigned, commissioners for ascertaining and adjusting the titles and claims to lands in the territory of Louisiana, have decided that Joseph Brazeau, original claimant, is entitled to a patent under the provisions of the 4th section of an act of the congress of the United States, entitled 'An act * respect- [* 412] ing claims to land in the territories of Orleans and Louisiana,' passed the third day of March, one thousand eight hundred and seven, for four arpens of land situate in the district of St. Louis, on the Mississippi, and order that the same be surveyed agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume recorded in book C., page three hundred and thirty-nine of the recorder's office."

"By virtue of a concession or order of survey, from Zenon Trudeau, lieutenant-governor." Signed by the commissioners.

Owing partly to a contest between the parties in this cause, before the department of public lands, the surveys were not executed and finally settled so that patents could be issued thereon, till the 26th of February, 1852; and the patents for both tracts were issued on the 26th of March following: that to Labeaume, or his legal representatives, embracing the land in Soulard's survey; and the survey and patent made for Joseph Brazeau, or his legal representatives, are located on the southern boundary of Labeaume's tract. This suit had been brought in the circuit court before the surveys were approved, or a patent issued to either party.

The representatives of Brazeau have refused to receive the patent issued to them, and protest against the binding force of the survey; insisting that the confirmation by the commissioners conferred a perfect title for different land from that covered by the patent. On this state of facts, the circuit court instructed the jury as follows:—

"We have been engaged in this cause for the last fifteen days,

endeavoring to ascertain the fact whether the tract of land confirmed to Louis Labeaume, according to Soulard's survey of 1799, embraces the sixteen arpens confirmed to Joseph Brazeau. Brazeau got a concession for twenty arpens in front on the Mississippi by four arpens back, and sold the northern sixteen arpens front to Labeaume, reserving four by four, or sixteen arpens, at the southern end of the tract granted by the concession. In 1799, Labeaume got his tract enlarged by an additional concession, including the sixteen arpens front, purchased from Brazeau. This latter concession was surveyed by Soulard, the proper Spanish surveyor, in 1799, and the survey was recorded.

" In 1810, the board of commissioners confirmed the grant to Labeaume, according to Soulard's survey. This being the effect of the confirmation ; at the same time that the board confirmed Labeaume's claim, including the sixteen arpens front, the claim of Brazeau was also confirmed, and a survey in each case was ordered by the board.

" Recently, the surveys of these tracts were made according to the precise instructions as to their boundaries, coming from the general land-office at Washington, and pursuant to the order of the secretary of the interior ; and on these surveys patents have issued, one to the legal representatives of Labeaume, and the other to the legal representatives of Brazeau ; which tracts adjoin each other, on the southern boundary of Labeaume's tract, as described in the patent ; and one question is, whether the plaintiff to this suit can claim land elsewhere than that described in his patent ; in other words, whether he can abandon the land surveyed for him, and granted by patent, and go further north and recover land there which never had been surveyed in conformity to the concession. We are of opinion that the United States reserved the power to locate, by survey, the land confirmed to Brazeau, and by such survey to separate it from the public lands, and from the lands claimed by others, and to issue a patent therefor, as was done in this instance ; that this reserved power was vested in the executive department, whose acts in this instance bound Brazeau, and those claiming under him ; nor can they extend their claim and recover land beyond the boundaries described in the patent to Brazeau or his legal representatives. The jury are further informed, that all instructions heretofore given inconsistent with the foregoing, are withdrawn from their consideration ; this instruction having been given at the request of the jury, because they could not agree according to the instructions heretofore given them by the court."

To the giving of which instruction to the jury, the plaintiff, by his counsel, at the time, duly excepted. A verdict was of course returned for the defendant.

To comprehend the scope of the foregoing instruction to the jury, we must consider the condition of claims to land derived from France and Spain, before the United States acquired Louisiana; with but few exceptions they were possessed and cultivated in the upper province, at the date of the treaty, by virtue of concessions from lieutenant governors and commandants of posts, in which no definite boundaries were prescribed by the concessions themselves, but the surveyor-general of the province was instructed to measure the land, and mark out the boundaries, and to put the interested party into possession. As a general rule, a survey was required before possession was given. Often, however, and probably in most instances, no survey had in fact been made when the United States acquired the country, in 1803;¹ and of this unsurveyed class was the concession to Joseph Brazeau. As these unlocated claims were usually surrounded in part by public lands, and in other part by the vague and unlocated claims of others, it became necessary that definite boundaries should be established by legal surveys, *so that the [* 414] limits of the public domain might be known, and private adjoining owners be exempt from disturbance and litigation.

It has often been held by this court that the judicial tribunals, in the ordinary administration of justice, had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey, or for any other purpose; but that claimants were compelled to rely upon congress, on which power was conferred by the constitution to dispose of, and make all needful rules and regulations respecting the territory and property of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority; a consideration that has occupied a prominent place in the legislation of congress from an early day.

The act of March 3, 1807, § 4,² was the first that gave a board of commissioners power to adjudicate claims against the United States, and conclude the government as to the question of right in the claimant. The judgments of the board on all claims for less than a league square were to a large degree judicial, but as their powers and duties depended on the acts of 1805, 1806,³ and more especially on that of 1807, when they confirmed Brazeau's claim, we must ascertain from these laws whether more was to be done to conclude the United States as to any definite and distinct tract of land.

By the 6th section of the act of 1807, the commissioners were bound to transmit to the secretary of the treasury, and to the surveyor general of the district where the land lay, transcripts of their

¹ 8 Stats. at Large, 200.² 2 Ib. 441.³ Ib. 391.

final decisions, made in favor of each claimant, and were required to deliver to him a certificate stating the circumstances of the case, and that he was entitled to a patent for the tract therein designated; which certificate was to be filed with the recorder, if the land lay in the district of Louisiana, and with the register of the land-office, when the land lay in the Orleans territory.

In all cases where tracts of land were granted by the board, which had not been previously surveyed, the 7th section of the act of 1807 declared that they should be surveyed under the directions of the surveyor-general; and that he should transmit general and particular plats of the tracts thus surveyed, to the proper register or recorder, and also transmit copies to the secretary of the treasury. The certificate and plat being filed with the register or recorder, he was thereupon required to issue a patent certificate in favor of the claimant, which being transmitted to the secretary of the treasury, entitled the party to a patent in like manner as patents were issued on lands sold by the United States.

[* 415] *By the act of April 29, 1816,¹ a surveyor-general was appointed for the territories of Illinois and Missouri, with general powers to survey the public lands into sections; and also to survey all lands confirmed by acts of congress, and to perform the duties imposed on his predecessor, the principal deputy for Missouri territory, whose duty it was to survey the claims confirmed by commissioners, in all cases where they had not been previously surveyed according to law.

The commissioners having given Brazeau a certificate that he was entitled to a patent, according to his confirmation, pursuant thereto, several surveys were made by deputy surveyors, under instructions from the surveyor-general, but they were rejected as improper and unlawful, either by him, or at the general land-office. Finally, in March, 1852, as above stated, the claim was surveyed according to the instructions of the secretary of the interior, and a patent issued conforming to this survey.

The circuit court charged the jury, in substance, that in this case of confirmation by the board sitting at St. Louis, in 1810, the claim being unlocated and vague, power was reserved to the United States to locate the tract by survey.

It was competent for congress to take up these titles or rights, and act on them either by legislating directly that each claimant should be confirmed, and have a perfect title to his actual possession lawfully acquired under France or Spain, without ascertaining, in the act of confirmation, or by any special means provided therein

¹ 3 Stats. at Large, 228.

the bounds of claims confirmed. But it was also competent for congress to provide, that before a title should be given to any possessor, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies, and in such manner, as might be fixed by congress. This is in entire accordance with the provisions of the treaty, which guarantees to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced — these being left to the nation to whose powers they were confided; so that the question is, what has congress deemed expedient? Now the policy which is so obvious, and which has been acted on by the United States ever since they began to exercise power over the public lands, namely, to give defined limits to grants, may well be supposed to have actuated congress in 1807. The provisions of that act clearly show, that although congress intended that the commissioners should adjudge the existence of good titles to lands held *under French and Spanish possessors, yet [*416] they did not intend that a final legal title, as against the United States, should be made to vague grants, until their bounds had been ascertained by the means there designated, and the particular tract defined by survey.

Congress might have said, as was done in case of the St. Louis town lots and out-lots, by the act of 1812,¹ that each man should own what he had lawfully possessed under the former government; and if congress had done so, then the question would have been, in this instance, a matter of fact, to be tried by a jury, as to what the plaintiff did formerly possess, and consequently own. But congress having said, by the act of 1807, that he shall be confirmed in what shall be designated by a survey made under the authority of the United States, according to the direction of the board of commissioners, and such direction to survey being a condition which the judgment of confirmation carried along with it, until the survey was made, the plaintiff's title attached to no land, nor could a court of justice ascertain its boundaries, as this power was reserved to the executive department of the federal government; it follows that the legal representative of Brazeau, who brings suit, had no title at the time it was brought that would support an action of ejectment.

It is ordered that the judgment of the circuit court be affirmed.

M'LEAN, J. In this case I do not dissent, as it is the understanding of the judges that the equity of the case remains open for investigation.

18 H. 19, 197, 409; 19 H. 79, 884; 1 B. 179, 195.

¹ 2 Stats. at Large, 748.

Adams v. Law. 17 H.

JAMES ADAMS, Executor of THOMAS LAW, deceased, and HENRY MAY, Administrator of EDMUND and THOMAS LAW, Appellants, v. JOSEPH E. LAW, by his next Friend, MARY ROBINSON.¹

17 H. 417.

An executed marriage settlement must be expounded upon principles applicable to other deeds.

The purpose of a marriage settlement being, to provide a jointure, and not to make a settlement on the issue of the marriage, a limitation was made to the children of the marriage, contingent upon the event that the wife should depart this life in the lifetime of the husband, *leaving issue of the said marriage*, one or more *children* then living. *Held*, that the word *issue*, as explained by the subsequent words, did not include grandchildren.

APPEAL from the circuit court for the District of Columbia. The case is stated in the opinion of the court.

Brent and May, for the appellants.

Carlisle and Coxe, contra.

[* 419] * GRIER, J., delivered the opinion of the court.

James Adams, the appellant, whose account, as executor of Thomas Law, deceased, was the subject-matter of the decree below, excepts to it for the allowance of the two following items:—

1. The claim of Lloyd N. Rogers, as administrator of Eliza P. Custis, the wife of the testator, amounting to the sum of \$29,249.33.

2. A claim of Edmund and Eleanor Rogers, grandchildren of Thomas Law and Eliza, amounting to \$66,154.84.

1. As the court is equally divided as to the legality of the first item, the decree must stand affirmed as to that amount, without further remark.

2. The claim of the grandchildren will require more extended notice.

This claim is founded on certain marriage articles, executed between Thomas Law, of the first part, Elizabeth Park Custis, of the second part, and James Barry, of the third part, on the 19th day of March, 1796. They recite that a marriage is intended between said Thomas and Elizabeth, and that “it is the wish and design of the parties that a jointure should be made to the said Elizabeth, in lieu and bar of all claim on the estate” of said Thomas, &c., &c. In consideration of the marriage portion-money, &c., the said Law conveys to James Barry certain real estate “to the said James Barry his heirs and assigns, forever, upon the trusts and to and for the uses,

¹ Mr. Chief Justice TANEY having been formerly consulted as counsel, did not sit on the trial of this cause.

intents, and purposes following, that is to say, for the use of the said Thomas Law, his heirs, and assigns, until the solemnization of the said intended marriage, and afterwards to permit and suffer him, the said Thomas Law, to receive all the issues and profits of the said lands and premises, during the term of his natural life, for his own use; and immediately after the decease of the said Thomas Law, in case the said Elizabeth Park Custis shall *survive [* 420] him, her intended husband, that she, the said Elizabeth Park Custis, shall have, accept, and receive the issues and profits of the said lands and premises, for and during the term of her natural life, to and for her own use and benefit; but in case the said Elizabeth shall depart this life in the lifetime of the said Thomas Law, leaving issue of the said marriage one or more children then living, then, from and immediately after the decease of the said Thomas Law, upon trust for the child or children of the said intended marriage, to be equally divided between them, if more than one; to have and to hold the same lands and premises, as tenants in common in fee simple, share and share alike; and if only one child, then to such child, his or her heirs and assigns forever; but in case there shall be no issue of said marriage, then, upon the death of the said Thomas Law and Elizabeth Park Custis, and the survivor or survivors of them, to revert back to the said Thomas Law, his heirs, or assigns, or subject to be disposed of by him by last will and testament, or other deed, as he may judge proper."

The marriage between the parties was solemnized in the same year. Afterwards, in 1800, Mr. and Mrs. Law joined in another deed, substituting Thomas Peters as trustee instead of Barry, and other property in place of that conveyed to Barry, but subject to the conditions and limitations of the marriage articles. And again, in 1802, another change was made in the property, subject to the same limitations. The daughter and only child of this marriage, intermarried with Lloyd N. Rogers, and died before her mother, leaving children, the claimants, Edmund and Eleanor Rogers. Mrs. Law died in 1832, and the testator in 1834.

The only question for our decision is, whether the grandchildren, Edmund and Eleanor Rogers, took any thing by the deed of settlement?

It is clear, from the face of this deed, that it is an executed marriage settlement, and that it must be expounded on legal principles applicable to other deeds. Limitations, either of legal or equitable estates, receive the same construction in a court of equity as in courts of law. "In executed trusts, whether by deed or will, the rule of law must prevail, and the apparent intention must give way to those

fundamental rules, which for ages have served as landmarks in the disposition of property." 2 Spence's Equity, 131.

The trustee in this deed had no duty to perform ; and as the estate is not limited to his own use, the trusts are but uses, and are executed as such by the statute. The object and purpose declared by the parties are, to secure a jointure to the intended wife in [* 421] lieu and bar of dower, and to release the marital rights * of the husband over the separate estate of the wife, in possession and expectancy. The settled property belonged entirely to the husband. The estate limited to the wife is contingent on her surviving her husband, in whom an estate for life is absolutely vested. If the life-estate of the wife should vest by the contingency of her survivorship, there is no provision for the children or issue of the marriage, and the fee reverts to the right heirs of the husband. The estate limited to the children of Mrs. Law is a contingent remainder, depending on the event that Mrs. Law shall "depart this life in the lifetime of said Thomas Law, leaving issue of said marriage, one or more children then living," &c.

Does this description include grandchildren? We think it does not.

The word "issue" is a general term, which, if not qualified or explained, may be construed to include grandchildren as well as children. But the legal construction of the word "children" accords with its popular signification, namely, as designating the immediate offspring. See Jarman on Wills, 51. It is true, in the construction of wills, where greater latitude is allowed, in order to effect the obvious intention of the testator, grandchildren have been allowed to take, under a devise "to my surviving children." But even in a will, this word will not be construed to mean grandchildren, unless a strong case of intention or necessary implication requires it. Hence it is decided, that a power of appointment to children will not authorize an appointment to grandchildren. *Robinson v. Hardcastle*, 2 Bro. Ch. 344; 4 Kent's Com. 345. In *Reeves v. Brymer*, it is said, by Lord Alvanley, that "children may mean grandchildren when there can be no other construction, but not otherwise." 4 Ves. 697.

The declared object of this deed is jointure, not a settlement for the issue of the intended marriage ; for there is no provision made for them, in case the wife should survive the husband. The contingency, also, on which this remainder depends, is not the leaving issue generally of the marriage ; but the "issue" to whom the estate is limited are described and defined to be "one or more children living," to be equally divided between them if more than one, and, "if only one child, to such child, his heirs," &c. There is no provision for the

issue of deceased children, or for grandchildren, under any circumstances. The parties have carefully defined what they mean by "issue," and the court, in construction of their solemn deed, have no right to distort its plain meaning, to meet contingencies not provided for. It is an ancient and well-settled rule of construction, that, "where a deed speaks by general words and afterwards descends *to special words, if the special words agree to the [* 422] general words, the deed shall be intended according to the special words; for, if the general words should stand without any qualification, the special words would be altogether void, and of no effect." 8 Rep. 307.

Hence, in the construction both of wills and deeds, where the instrument has not, so carefully as in the present case, limited the word "issue" to children living, &c., but where the term is used without qualification, and is in another part of the same instrument supplied by the word child, or children, as a synonym, the courts have uniformly restrained its signification to children. Thus, in *Carter v. Bentall*, 2 Beav. 557, where the devise was a moiety to "issue" of his daughter, and, if only one child, then to such one child, and the trustee was ordered to lay out the dividends in the maintenance of such "issue," Lord Langdale, M. R., held that the word issue was thus explained by the testator to mean "children."

In the case of *Loveday v. Hopkins*, Ambler, 273, it was held that grandchildren were not entitled under a bequest to "heirs," because the term appeared, by the context of the will, to be used in the sense of children.

In *Swift v. Swift*, 8 Sim. 168, by marriage articles the jointure property was limited, after the death of the survivor, on the "issue" of the marriage living at the death, in equal share if more than one, and if but one, to go to such "child." The only child of the marriage died before the contingency, leaving a child. It was held that "issue" was to be construed "child," and the legacy did not vest in the grandchild.

It would lead to too great prolixity to examine particularly the very numerous cases in which similar language has received the same construction. A reference to a few more directly in point will suffice. *Fitzgerald v. Field*, 1 Russell, 430; *Needham v. Smith*, 4 *ibid.* 318; *Ridgeway v. Munkittrick*, 1 Drury & Warren, 84; *Peel v. Catlow*, 9 Sim. 373; *Jennings v. Newman*, 10 *ibid.* 223; *Tawney v. Ward*, 1 Beav. 563; *Winn v. Fenwick*, 11 *ibid.* 438; *Campbell v. Sandys*, 1 Schoales & Lefroy, 281.

Being of opinion, therefore, that the grandchildren took nothing under the limitations of the deed of marriage settlement, the decree

Herndon v. Ridgway. 17 H.

of the court below is reversed, as to the allowance of \$66,154.84, made to Edmund and Eleanor Rogers, and affirmed as to the residue; and the record remitted, with directions to make distribution accordingly.

[*423] *Messrs. *Brent* and *May* afterwards filed a motion as follows: —

“The above appellants come here and move the honorable supreme court so to amend their decree and the mandate to be remanded thereon, as to declare that the grandchildren of the testator, Thomas Law, by reason of their election and renunciation, as shown in the interlocutory decree of the circuit court, (see page 66 of the record,) are not entitled as legatees of said testator to participate in the distribution of the fund in controversy. And in making this motion, the appellants suggest that this question arises on the record in this court, and that it is the practice of this court to settle all questions apparent on the record, to prevent future appeals, and especially where, as in this case, the effect of the election and renunciation only becomes material in carrying out the decree of this court, disallowing the claim which the appellees elected to abide by; all of which is respectfully submitted.”

And the court having duly considered the same, Mr. Justice M'LEAN, announced the following decision thereupon, to wit: —

“The court hold that the pleadings in the case do not embrace the point stated in the above motion. The heirs referred to, the children of Mrs. Rogers, having relinquished all claim under the will, and claimed under the deed of settlement, the court held they were not entitled to any part of the estate, under the deed of settlement, on a construction of that instrument. Under these circumstances, whether they can claim as distributees of the general estate, is a question not considered by the court. The motion is therefore overruled.”

18 H. 580; 19 H. 855; 1 B. 258.

EDWARD HERNDON, Appellant, v. JAMES C. RIDGWAY, ERI RIDGWAY,
WILLIAM H. GASQUE, and HENRY DAVIS.

17 H. 424.

The district court of the United States in Mississippi, has not jurisdiction to entertain a bill to compel parties to interplead, who are not found within the district, and on whom no personal service was made.

APPEAL from the district court of the United States, for the northern district of Mississippi. The case is stated in the opinion of the court.

Adams, for the appellant.

Phillips, contra.

* CAMPBELL, J., delivered the opinion of the court. [* 425]

The plaintiff complains that, in 1849, he purchased from James C. Ridgway, a number of slaves, for whom he gave his bond to the vendor; that this was transferred to E. T. Ridgway for the use of Wm. H. Gasque, and that a suit is pending in the district court of the United States for that district, to collect the sum due; that the slaves are in the possession of Wm. P. Givan, to whom he sold them with a warranty of the title. That one Davis claims the slaves under a title paramount to that derived from Ridgway, and had brought a suit for them in the state court, which had proved ineffective, and now threatens to renew it. The object of the bill is to require the two Ridgways and Gasque, on the one part, and Davis, on the other, to interplead in the district court of the United States, to settle their right to the slaves, so that he may pay the purchase-money to the proper person. He alleges that the vendor, Ridgway, is insolvent.

The four defendants are citizens of Alabama. Notice of the motion for injunction was served on the attorneys for the plaintiff, in the suit in the district court, and upon the attorneys who prosecuted the suit against Givan for Davis in the state court. The attorneys for Davis disclaim any connection with him in this controversy, and move to dismiss the bill for want of jurisdiction. Gasque appears and demurs to the bill for the same cause, and no notice or appearance exists in the record for the vendor, Ridgway. The district court retained the bill twelve months, and then dismissed it on these motions.

The jurisdiction of the district court over parties is acquired only by a service of process, or their voluntary appearance. It has no authority to issue process to another State. In the present case, the absent defendants decline to appear, and process cannot be served, so that the court is without any jurisdiction over the essential parties to the bill. There was no course open to it, except to dismiss it for the want of jurisdiction, upon the motions submitted for that object. *Toland v. Sprague*, 12 Pet. 300.

There is no error in the record, and the decree is affirmed.

20 H. 208.

City of Boston v. Lecraw. 17 H.

THE CITY OF BOSTON, Plaintiff in Error, v. DAVID R. LECRAW

17 H. 426.

The title of the city of Boston to a part of the shore of the sea, within its limits, examined. Though the proprietor of the shore, in Massachusetts, may build thereon, and thus exclude the public from its use for navigation when covered by the tide, until he does so the public may lawfully so use it; such use is not adverse, and lays no foundation for a presumption of a dedication of the land to that use.

ERROR to the circuit court of the United States for the district of Rhode Island.

Ames and Chandler, for the plaintiff.

Tilton and Durant, contra.

[* 431] * GRIER, J., delivered the opinion of the court.

The defendant in error, a citizen of New Hampshire, instituted this suit against the city of Boston, charging it with the erection of a public nuisance which was specially injurious to the plaintiff. The declaration contains seven counts. As the jury, under the instructions given by the court, gave a verdict for the plaintiff below on the last two only, it will be unnecessary to notice the others, or the points of law applicable to them.

These counts set forth, in substance, that in the year 1849 the plaintiff and a partner, since deceased, carried on the business of buying and selling wood and coal in Boston, and were in possession of a wharf known as the Bull wharf; that the dock forming the southerly boundary of said wharf, and extending from Sum-
[* 432] mer street wharf, was a part of the harbor of Boston, *and a public dock, slip, or way, navigable by vessels, and over which the waters of the sea ebbed and flowed, and by reason thereof the plaintiff ought to have been allowed to pass and repass as over a navigable highway with boats and vessels, over and through said dock from the wharf by him possessed to the channel of the sea; that defendant had erected piles and a drain in the dock, to the destruction of the navigation therein, and the special injury of the plaintiff.

A congeries of points or prayers of instruction, exceeding thirty in number, and covering nearly as many folios, were submitted to the court, some of which were given as prayed for, some with "qualifications," and many refused.

If a judge, in answering such a mass of hypothetical and verbose propositions, should occasionally contradict himself, or fall into an error; or if the jury, instead of being instructed in law, should be

confused and misled, it may be considered the legitimate result of such a practice. We do not think it necessary, therefore, to examine particularly each one of this labyrinth of propositions; but, after a brief history of the title of the parties, and the admitted facts of the case bearing on its merits, we will state the law as applicable to them, and thus be enabled to test the correctness of the charge of the court in the instructions given or refused.

The original charters to the Plymouth company of that part of the territory which afterwards constituted the colony of Massachusetts, conferred on them not only the property in the land, but all the "franchises, loyalties, liberties, &c., and the requisite civil and political powers for the government of the colony."

By the common law of England, the right of littoral proprietors, bounding on public navigable waters, extended to high-water mark only. But by an ancient ordinance, usually denominated the ordinance of 1641, § 3, it is declared: "That in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further: Provided, that such proprietors shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves, to other men's houses or lands."

This is the foundation of what may be called the common law of Massachusetts on this subject. By it the grantee of land bounding on navigable waters where the tide ebbs and flows, acquires a legal right and a vested interest in the soil of the shore between high and low-water mark, and not a mere *indulgence or [* 433] gratuitous license, given without consideration, and revocable at the pleasure of the grantor. See *Austin v. Carter*, 1 Mass. 231, and *Commonwealth v. Alger*, 7 Cush. 71.

As a consequence of such ownership, it is ruled that the proprietor of the land bounding on tide waters has such a propriety in the flats to low-water mark, that he may maintain trespass, *quare clausum fregit*, against one who shall enter and cut down piles placed there by the owner, with a view to build a wharf or otherwise inclose the flats. But the right of the littoral proprietor under the ordinance has always been subject to this rule; that until he shall build upon his flats or inclose them, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purposes of navigation; so long as the owner of the flats permits the sea to flow over them, the individual right of property in the soil beneath does not restrain or abridge the public right. 7 Cush. 75. This property

is also subject to certain restrictions in its use, so that the State, in the exercise of its sovereign power of police for the protection of public harbors, and to prevent encroachments therein, may establish lines, and restrain and limit this power of the owner over his own property.

The whole territory now occupied by the city of Boston was originally granted to and held by the town, which made grants thereof from time to time, to such persons, and on such conditions, as it deemed expedient; and the city of Boston, as successor to the town, continues to own such portions of the original territory as have not been sold or otherwise disposed of. But, while it acknowledged the rights of its vendees of lands adjoining the shore to wharf out opposite their respective lots, by virtue of the police power exercised by it over the harbor, it superintended and defined the limits within which the owner should exercise his rights.

In 1683, "the selectmen of Boston staked out a highway for the town's use, on the southerly side of the land belonging to John Gill, deceased, (under whom the plaintiff claims,) being thirty feet in width, from the town corner of said Gill's wharf, next the sea." This is the street since called Summer street. They laid also another street, "near the shore, on the proprietor's land, fifty feet towards the seashore." But they ordered, at the same time, "that the flats and lands between the said highway and the sea be granted to the proprietors of the land, which are abutters on the way, in equal portion to their fronts."

Summer street, as laid out, ended at high-water mark, and has not yet been extended, nor have the city made any erections on their land between high and low water, previous to 1850; but the public right of navigation over it has been exercised up to the foot of Summer street. The drains and sewers from that street, and others connected with it, have hitherto been made to discharge their contents at that point. In course of time, however, as the city increased, this drainage increased also, to such an extent as to become pestilential, and a very great nuisance to the neighborhood. In consequence thereof, the city of Boston has been twice (in 1848 and 1849) indicted for the nuisance, and sentenced to pay a fine. Since that time, the mayor and aldermen, acting as the board of health, have directed the drains or sewers to be continued out, on the land of the city opposite Summer street, to low-water mark. This is the first attempt by the city to reclaim this land from the sea, and use it for their own benefit, and constitutes the erection which is now the subject of complaint. The sewers are not made to discharge their contents on the plaintiff's land, but into the sea. No property

of the plaintiff has been taken for the public use; nor does he in these counts, on which the verdict was obtained, claim any private right of way over the land of defendants, but states his damage to have accrued by a public nuisance, specially injurious to his public right of navigable way over the lands of the defendant.

That the plaintiff had, in common with the rest of the world, a right to navigate over the land belonging to the city, on which the erections complained of were made, is not disputed. Nor is the title of the city to the land so used, unless they have granted it away, or otherwise disposed of it, a subject of dispute in the case. Those under whom the plaintiff claims, as owners of the property adjoining Summer street have exercised their right of dominion over the land to low-water mark by covering it with a wharf, many years ago, which is called Bull's wharf. And those who adjoin the street on the other side, have in the same manner exercised their right by erecting a wharf called Price's wharf. The property of the city being but thirty feet wide, and lying between these two wharves, was thus, by the accidents of its form and position, converted into a dock or receptacle for vessels, without any act of the owners of the land. A dock is defined by philologists, according to the American use of the term, to be "the space between wharves." No dock or slip has been made by the city or people of Boston on their land, either for their own use, or that of any other extraneous or indefinite public. So long as they did not elect to exercise their dominion over this part of the shore, the public right of navigation continued. It was a right defeasible at the will of the owner of the subjacent land. It was a natural right, not derived from any grant, real or presumed, originating with the owner of the soil. But the adjoiners, by the use of this right of navigation in connection with their [* 435] wharves, claim a right to enjoy the benefit of defendant's property as a dock for their wharves, and thus convert it to their private use, under color of a public right.

In order to effect this, it is contended that the people of Boston, by not exercising their right of reclamation, and by using their property according to their own pleasure, have dedicated it to the public, or world in general, as distinguished from the public or people of Boston, and have abandoned the full dominion which they once might have exercised over it.

The people of Boston, who owned this land as their common and private property, acted through a corporation, whose corporate grants and licenses are matters of record. Their own use of their own property for their own benefit cannot be called a dedication of it to any other public of wider extent. Whether it was called "town

dock" or "public dock," (which were used as synonymous terms,) it would furnish no ground to presume that they had parted with their right to govern and use it in the manner most beneficial to the people or public of the town or city.

The principles of law on which a presumption of the dedication of private property to public use are founded, are correctly stated (3 Stark. Ev. 1203) to be: "That the law will not presume any man's acts to be illegal, and will, therefore, attribute to long continued use and enjoyment, by the public, of a right of way or other privilege in or over the lands of another, to a legal rather than an illegal origin; and will ascribe long possession which cannot otherwise be accounted for, to a legal title: upon a reasonable principle and very forcible presumption, that the acquiescence in such enjoyment, for a long period, by those whose interest it was to interrupt it, arose from the knowledge and consciousness on their part that the enjoyment was rightful, and could not be disturbed; and also on consideration of the hardship which would accrue to parties, if after long possession, and when time had robbed them of the means of proof, their titles were to be subjected to a rigorous examination."

It is evident that these principles can have no application to the present case. The exercise of the public right of navigation over the soil of defendant is fully accounted for without any presumption of grant or dedication by the owners. The public enjoyed this highway of nature by a title reaching far before the advent of the Pilgrims, and paramount to any grant to them or by them; but by the law the enjoyment of this public right was made defeasible by the owner of the land. Till he reclaimed his land, the public needed no grant or dedication by him, in order to their enjoyment of [* 436] the right of navigation over it. The * owner was not bound to exercise his right within a given time, or forfeit it. A man cannot lose the title to his lands by leaving them in their natural state without improvement, or forfeit them by non-user. See *Butz v. Ihrie*, 1 Rawle, 218.

So long as the city chose to leave their land unreclaimed from the sea, they could not hinder the public navigation over it when covered with water, and could not, therefore, be properly said to acquiesce in that which they could not hinder. Nor could a grant or dedication of a right of way over their land be presumed in favor of the public, who enjoyed it under a different and paramount tenure. The public right has existed and been exercised for thousands of years, but is not hostile to the defendants, though defeasible at their will. It resembles the case of *Rex v. Hudson*, 2 Strange, 909, where a dedication of land as a public highway was claimed by proof of sixty

years' use ; but the defendant produced a lease of the way for fifty-six years, and the court decided that no presumption of a dedication could arise during the lease, for the owner could not deny their right to use it, and there could be no presumption from his acquiescence.

It is true that the presumption of a dedication is one of fact, and not an artificial inference of mere law, to be made by the court, yet it is an inference which the court advise the jury to make upon proof of certain facts. It is the duty of the court to state what facts, if proved, will justify such a presumption. To instruct the jury that certain facts are not "sufficient" evidence on which to presume a dedication, without informing them what facts would constitute sufficient evidence for that purpose, is devolving on them the decision of both law and fact, and permitting them to dispose of men's property at their discretion, by presuming grants without a particle of evidence to authorize such presumption.

The counts on which the jury have assessed the damages in this case claim no other right of highway over the lands of the defendant, save the public right of navigation, nor has the evidence shown that he is entitled to any other. The title of the defendants to the land was not disputed. The court ought, therefore, to have instructed the jury that the public right of navigation over the land of defendant was defeasible ; that the owners had a right to reclaim their land by wharfing out or making erections thereon beneficial to themselves ; that there was no evidence in the case whatever by which the jury could presume that the city or people of Boston had dedicated their land to the use of some other public besides themselves ; that it was, consequently, not only the right but the duty of the authorities of the city to extend their sewers to low-water mark, for the purpose * of removing a nuisance injurious to the health of the [* 437] citizens ; and having done so on their own land, the damage to the plaintiff, if any, was *damnum absque injuria*, and he was not entitled to recover. The record shows that these or equivalent instructions were prayed by the counsel of defendant, and refused by the court.

The judgment of the circuit court is, therefore, reversed, and a *venire de novo* awarded.

Daniel, J., dissented.

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AMOS J. BRUCE and FRANKLIN STEELE, Plaintiffs in Error, v. THE UNITED STATES.

17 H. 437.

Under the act of March 3, 1797, § 1, (1 Stats. at Large, 512,) a treasury transcript of an account of an Indian agent, adjusted and certified by the proper officers, is evidence, as against him and his sureties, that he received the several sums of money therein charged to him as received in the regular and usual course of the business of the department, without the production of copies of his receipts therefor.

United States v. Buford, 3 P. 12, and Same v. Jones, 8 P. 376, explained.

If a balance was due from an officer when reappointed, the presumption is that it was then in his hands, and if so his sureties, on his reappointment, are responsible for its due application. But they may relieve themselves, by showing that he was in fact a defaulter when they became his sureties.

The recital of an appointment in a bond, estops the obligors from denying it, and it is not necessary to produce the commission of the officer or its copy.

THE case is stated in the opinion of the court.

Vinton, for the plaintiffs.

Cushing, (attorney-general,) *contra*.

TANEY, C. J., delivered the opinion of the court.

[* 438] * The writ of error, in this case, is brought upon a judgment obtained by the United States in the circuit court for the district of Missouri.

It appears that Bruce, one of the plaintiffs in error, was appointed agent for the Sioux tribe of Indians, in 1844, and gave the bond on which this suit was brought, for the faithful performance of his official duty. Franklin Steele, the other plaintiff in error, and John Atchison, were sureties in the bond; and Atchison having died, pending the suit in the circuit court, it abated as to him, and the judgment in favor of the United States was rendered against the plaintiffs in error. The breach assigned is, that there was a balance in Bruce's hands, on the 1st of July, 1848, of \$10,191.69, which he refused to turn over and pay to the United States, when required to do so.

Bruce had held the same appointment for four years, before he received the one of which we are now speaking, and his account with government begins in May, 1840.

At the trial, the United States offered in evidence a transcript from the books of the treasury department, stating the account of Bruce from the time of his first appointment. According to this account, the balance above mentioned was due to the United States, but Bruce claimed various additional credits, amounting altogether to

\$6,931.68, which had been disallowed or suspended by the accounting officers, as appears by the closing account, usually called the statement of differences.

The United States further offered the transcript of a letter from the second auditor, whose duty it was to settle this account, addressed to Bruce, stating the balance due from him, according to the settlement in the auditor's office, and inclosing him the statement of differences above mentioned, and directing him to turn over to his successor in office the balance of the public money in his hands and also offered the deposition of his successor, stating that he had made the demand, but that Bruce had failed to comply with it.

The defendants, therefore, objected to the admissibility of this evidence, but the court overruled the objection, and this constitutes the first exception in the case.

The objection is stated in general terms, and applies to the whole evidence offered by the United States, without pointing out the particular ground of the objection. But we understand from the argument here, that the defendants, in the court below supposed that the transcript from the books of the treasury was not, of itself, evidence that he received the several sums of money charged against him, and that authenticated copies of his receipts ought to have accompanied the transcript.

But this objection cannot be maintained. The act of 1797 *provides, that a transcript from the books and pro- [* 439] ceedings of the treasury, certified by the register, and authenticated under the seal of the department, shall be admitted in evidence. And the act of March 3, 1817,¹ directs that all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the treasury department. The act makes the auditors and comptrollers, by whom the accounts in the war and navy departments are settled, officers of the treasury department. And the provision above mentioned in the act of 1797, in relation to transcripts from the books and proceedings in the treasury, is extended to the accounts of the war and navy departments; and the certificates of the auditors respectively charged with the settlement of these accounts, are to have the same effect as that directed in the former act of congress to be signed by the register.

The accounts in question belonged to the war department, during the period of Bruce's agency, and were adjusted and certified by the proper officers. There could, therefore, be no objection to the evidence on that score.

Nor do we see how any valid objection can be made to the items

¹ 3 Stats. at Large, 366.

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charged against Bruce in the transcript. The books of the accounting officer necessarily contain the charges against, as well as the credits of, the disbursing officer. The accounts could not be adjusted on the books in any other manner; and the transcript, or, in other words, the copy of the entire account as it stands on the books, (which must include debits as well as credits,) are made evidence by the law. Nor do we see any reason for restricting the words of the acts of congress within narrower limits than the words plainly imply. The accounts are adjusted by public sworn officers, bound to do equal justice to the government and the individual. They are records of the proper departments, and always open to the inspection of the party interested. And, after all, the transcript is only *primâ facie* evidence; and, if the party disputes any of the charges against him, it is in his power, by a proper application to the court, supported by sufficient evidence, to obtain the original vouchers on which he was charged, if necessary to his defence, and to show that the debit against him is erroneous.

If, indeed, it appeared on the face of the account that an item was charged against him which had not come to his hands in the regular and ordinary operations of the government, and of which, therefore, the accounting officers could have no official knowledge, the transcript would not be evidence to support that charge. But no such debit is found in this transcript; for, according to the regular and ordinary practice of the government, in cases of this description, the [* 440] agent receives *from his predecessor in the office the money and property remaining in his hands; and other funds, which it may be his duty to disburse, are sometimes sent through the general superintendent at St. Louis, sometimes by a treasury draft, forwarded directly to himself, and sometimes through the agency of a military or other officer of the government. And these advances pass through the proper offices of the treasury and war departments, (now through the department of the interior,) and the agent is charged upon his own receipts and warrants, issued in his favor.

This appears to have been done in the case before us. Every payment or advance to him is separately charged, and the time when it came to his hands, as well as the name of the person from whom he received it. The copies of his receipts, or of the vouchers for the charge, would have given him no further information; and the acts of congress above referred to do not require them to be annexed to or accompany the account, but, in plain and unambiguous terms, makes the transcript itself evidence.

Cases analogous to this have, on several occasions, come before the court, and have all been decided upon the construction of the acts

of congress above stated. *Smith v. United States*, 5 Pet. 292; *Coxe and Dick v. United States*, 6 *ibid.* 202; and *Hoyt v. United States*, 10 How. 109, are all in point. And the cases of the *United States v. Buford*, 3 Pet. 29, and *United States v. Jones*, 8 *ibid.* 376, which are sometimes supposed to maintain a contrary doctrine, are perfectly consistent with the other decisions and with the one now given.

For, in the case of *The United States v. Buford*, (who was a deputy commissary,) the money had been placed in his hands by Morrison, who was a deputy quartermaster, without authority, and contrary to his duty, and the accounting officers refused to credit it in Morrison's account. Upon application to congress, however, a law was passed authorizing the accounting officers to allow the credit, upon receiving from Morrison an assignment to the United States of all his right to the money mentioned in the receipt, which he had taken from Buford when he advanced him the money. Morrison made the assignment accordingly; and thereupon an account was stated on the books of the treasury, charging Buford as debtor to Morrison for the amount advanced to him. And a transcript from this account was offered in evidence. It is set out in the report of the case, and it is evident that this account was not within the letter or spirit of the act of congress. It certainly could not prove the receipt of Buford; for the whole transaction was outside of the regular operations of the government, and the *accounting officers could not be presumed [*441] to have any official knowledge of the unauthorized transactions between the parties.

And so, again, as to the case of *The United States v. Jones*, who was surety in the bond of an army contractor. The transcript contained charges against the contractor for bills of exchange, drawn by him and paid to other persons. The court regarded this operation as not within the ordinary mode of proceeding in the department, and that the accounting officers could not be presumed to have any knowledge of the drawing of those bills, or of their indorsement to others, and thereupon rejected these items. It will be seen, therefore, that the cases of *The United States v. Buford* and *United States v. Jones*, are distinguishable from the present case, as well as from the other cases above referred to, and stand on different ground.

Indeed, none of the debits in the transcript appear to have been disputed by the plaintiffs in error, and no exception was taken to any one of them. The statement of differences between the accounting officers and Bruce shows that there was no difference as to the amount with which he was chargeable. The difference consisted in a variety of credits which he claimed, and which had been suspended or refused at the treasury; and the testimony offered by him, after

his objection to the transcript, had been overruled, and the document admitted in evidence was altogether directed to support the credits he claimed, and not to impeach any one of the debits against him.

The circuit court were, therefore, right in overruling his objection to the testimony offered by the United States.

We proceed to the next exception.

After the testimony on both sides was closed, the plaintiffs in error asked for the following instructions to the jury, all of which were refused, and the direction which follows them given :—

“1. That unless they believe, from the evidence, that Bruce was legally appointed and commissioned as such Indian agent, they will find for defendant, Steele; and they are further instructed that the commission, or a legally certified copy thereof, is the highest and best evidence thereof.

“2. If the jury find, from the evidence, that Bruce was a defaulter at the time of the execution of the bond sued on, they will find for defendant, Steele, to the extent of such preëxisting default.

“3. Defendant, Steele, is not liable for any defalcation existing on the part of Bruce prior to the 29th of August, 1844.

“4. Defendant, Steele, is not liable as the surety of Bruce, [* 442] * for any money received by Bruce before he was sub-Indian agent.

“5. The original receipts of Bruce, or certified copies of the originals on file, is the best evidence of any moneys received by him, and the jury will disregard the transcript of accounts from the books, unless they believe it was out of the power of plaintiff to produce the receipts, or certified copies thereof.”

These instructions were all refused, and “the court directed the jury, that if, when Bruce was reappointed agent, in 1844, he had moneys in his hands of the United States which he received as agent under his previous commission, then he was bound to apply and account for such moneys under the second commission, and his sureties are bound under the bond which is sued on. But if Bruce had appropriated the moneys received under the previous commission, to his own use, when this bond was given, then the first set of sureties are responsible for the moneys thus illegally appropriated, and these defendants are not liable, and the burden of proof is on the defendants to show that Bruce had illegally appropriated the moneys before the bond sued on was given.”

We think the court were right in refusing the prayers, and in giving this instruction. In relation to the first instruction asked for, it certainly was not necessary for the government to produce the com-

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mission of Bruce, or a certified copy. The bond upon which the suit was brought recites that he was appointed Indian agent, and the obligors in the bond are, therefore, estopped from denying it.

And as to the 5th, it is but a repetition of the objection to the transcript, which we have already disposed of.

And as relates to the 2d, 3d, and 4th, we think the court was right in refusing them, and giving the instruction as above stated. When Bruce received his second commission, if any money or property which he received in his former term of office still remained in his hands, he was bound to apply and account for it, under the appointment he then received.

The terms of the bond clearly require it, and his sureties are bound for it. It was so much money in his hands to be disbursed and applied under his second appointment. Indeed, if it were otherwise, the government would have no security for it. For, if it was not wasted or misapplied during his first official term, but still remained in his hands to be applied according to his official duty, the sureties in his first bond would not be liable. For there would in that case be no default or breach of duty in that term of office; and if afterwards wasted or misapplied, it would be a breach of duty in that official term for which Steele was one of his sureties.

* Undoubtedly, the sureties in the second term of office [* 443] are not responsible for a default committed in his first. But if any part of the balance now claimed from him was misapplied during that period, it was incumbent on the plaintiffs in error to prove it. No officer, without proof, will be presumed to have violated his duty; and if Bruce had done so, Steele had a right, under the opinion of the circuit court, to show it, and exonerate himself to that amount; but it could not be presumed, merely because there appears by the accounts to have been a balance in his hands at the expiration of his first term.

We see no error in the opinions of the circuit court, and the judgment must therefore be affirmed.

RICHARD H. HENDRICKSON, Complainant and Appellant, v. SAMUEL L. HINCKLEY.

17 H. 443.

A court of equity does not interfere with judgments at law, unless the complainant had an equitable defence, of which he could not avail himself at law, because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud, or accident, unmixed with negligence of himself or his agents.

A court of equity will not interfere to enforce a set off, if the complainant could have made it in an action at law, and voluntarily waived it there.

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THE case is stated in the opinion of the court.

Hart, for the appellant.

Mills, contra.

CURTIS, J., delivered the opinion of the court.

The complainant filed his bill in the circuit court of the [*445] * United States, for the district of Ohio; and that court having ordered the bill to be dismissed, on a demurrer, for want of equity, the complainant appealed.

The object of the bill is to obtain relief against a judgment at law, founded on three promissory notes, signed by the complainant, and one Campbell, since deceased.

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defence, of which he could not avail himself at law, because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 333; *Creath v. Sims*, 5 How. 192; *Walker v. Robbins et al.* 14 How. 584.

The application of this rule to the case stated in the bill, leaves the complainant no equity whatever.

The contract under which these notes were taken was made in December, 1841. One of the notes is dated in December, 1841, and the others in January, 1842. In April, 1848, suit was brought on the notes. In October, 1850, the trial was had and judgment recovered. The reasons alleged by the bill for enjoining the judgment are:—

1. That the consideration of the notes was the sale of certain property, and the complainant and Campbell were defrauded in that sale. But this alleged fraud was pleaded, in the action at law, as a defence to the notes, and the jury found against the defendants. Moreover, upwards of six years elapsed after the sale, and before the suit was brought; and the vendees, who do not pretend to have been ignorant of the alleged fraud during any considerable part of that period of time, did not offer to rescind the contract, nor did they, at any time, either return or offer to return the property sold.

2. The bill alleges certain promises to have been made by an agent of the defendant, concerning the time and mode of payment of the notes when they were given. These promises could not be availed of in any court, as a defence to the notes; for, to allow them such effect, would be to alter written contracts by parol evidence, which

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cannot be done in equity any more than at law, in the absence of fraud or mistake. *Sprigg v. The Bank of Mount Pleasant*, 14 Pet. 201.

But whatever substance there was in this defence, it was set up, at law, and upon this, also, the verdict was against the defendants; and the same is true of the alleged partial failure of consideration.

3. The next ground is, that on the trial at law, letters from the joint defendant, Campbell, containing admissions adverse *to the defence, were read in evidence to the jury; and the [*446] bill avers that Campbell was not truly informed concerning the subjects on which he wrote, and that, until the letters were produced at the trial, the complainant was not aware of their existence, and so was surprised.

To this there are two answers, either of which is sufficient. The first is, that the complainant and Campbell, being jointly interested in the purchase and ownership of the property for which these notes were given, and joint defendants in the action at law, and there being no allegation of any collusion between Campbell and the plaintiff in that action, the complainant cannot be allowed to allege this surprise. If he did not know what admissions Campbell had made, he might, and with the use of due diligence, would have known them; and he must be treated, in equity as well as at law, as if he had himself made the admissions.

Another answer is, that if there was surprise at the trial, a motion for delay, as is practised in some circuits, or a motion for a new trial, according to the practice in others, afforded a complete remedy at law.

4. The complainant asserts that he has claims against the defendant, and he prays that, inasmuch as the defendant resides out of the jurisdiction of the court, these claims may be set off against the judgment recovered at law by the decree of the court upon this bill. But upon this subject the bill states, speaking of the action at law: "Your orator frequently conferred with L. D. Campbell, one of his attorneys, in reference to the said cause, and frequently spoke to him of the claims which your orator and said Andrew Campbell had against the said Hinckley, as hereinafter specifically set forth; but the said Campbell, attorney, regarded the defence pleaded as so amply sufficient as that neither he nor your orator ever thought it necessary to exhibit said demands against said Hinckley as matter of defence, could it even have been done consistently with the defence made as aforesaid."

He purposely omitted to set off these alleged claims in the action at law, and now asks a court of equity to try these unliquidated

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claims and ascertain their amount, and enable him to have the same advantage which he has once waived, when it was directly presented to him in the regular course of legal proceedings. Courts of equity do not assist those whose condition is attributable only to want of due diligence, nor lend their aid to parties, who, having had a plain, adequate, and complete remedy at law, have purposely omitted to avail themselves of it.

It is suggested that courts of equity have an original [* 447] *jurisdiction in cases of set-off, and that this jurisdiction is not taken away by the statutes of set-off, which have given the right at law. This may be admitted, though it has been found exceedingly difficult to determine what was the original jurisdiction in equity over this subject. 2 Story's Eq. 656, 664. But whatever may have been its exact limits, there can be no doubt that a party sued at law has his election to set off his claim, or resort to his separate action. And if he deliberately elects the last, he cannot come into a court of equity and ask to be allowed to make a different determination, and to be restored to the right which he has once voluntarily waived. *Barker v. Elkins*, 1 Johns. Ch. 465; *Greene v. Darling*, 5 Mason, 201.

Similar considerations are fatal to the plaintiff's claim for relief, on the ground that the defendant resides out of the State, and that therefore he should have the aid of a court of equity, to subject the judgment at law to the payment of the complainant's claim. When the complainant elected not to file these claims in set-off in the action at law, he knew that defendant, who was the plaintiff in that action, resided out of the State. If that fact was deemed by the complainant insufficient to induce him to avail himself of his complete legal remedy, it can hardly be supposed that it can induce a court of equity to interpose to create one for him. The question is not merely whether he now has a legal remedy, but whether he has had one and waived it. And as this clearly appears, equity will not interfere.

The decree of the court below is affirmed.

JAMES STEVENS, Appellant, v. ROYAL GLADDING and ISAAC T. PROUD.
17 H. 447.

Stevens v. Cady, 14 How. 528, reconsidered and affirmed.

A court of equity cannot make a decree for the penalties incurred for violation of copy-right.

But may decree an account of profits under the prayer for general relief.

THE case is stated in the opinion of the court.

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Ames, for the appellee.

No counsel *contra*.

* CURTIS, J., delivered the opinion of the court. [* 450]

The appellant filed his bill in the circuit court of the United States for the district of Rhode Island, to restrain the defendants from printing and publishing a map of that State, whereof he claimed to be the exclusive proprietor, under the act of congress of February 3, 1831,¹ concerning copyrights of maps, &c. The defendants admit that they have sold such maps, but allege that a copperplate, owned by the plaintiff, was duly sold on an execution which issued on a judgment recovered against the plaintiff, in the court of common pleas for the county of Bristol, in the State of Massachusetts, and that one Isaac H. Cady was the purchaser of the plate under that sale; that Cady has used the plate to print the said maps, and the defendants have sold them; and they insist that by the purchase of the copperplate, Cady acquired the right to print maps therewith, and to publish and sell them; and that, therefore, the defendants have not infringed on any exclusive right of the complainants.

By reference to the case of *Stevens v. Cady*, reported in 14 How. 528, it will be seen that the same title, now asserted by these * defendants, was tried on that case, between the complain- [* 451] ant and Cady. But, as is stated in the report of that case, no counsel then appeared or was heard in support of Cady's title; and Mr. Justice Woodbury, who sat in the cause in the circuit court, having deceased, this court was not apprised of the grounds and reasons on which the decree of that court, dismissing the bill, rested; and when this cause was called, counsel having appeared and desired to be heard, though he frankly avowed that the question passed on in the former case, was the only one which could be raised, the court readily assented, and, having now considered the argument of the respondent's counsel, the court directs me to state its opinion in the cause.

The positions assumed by the respondent's counsel are, that copy and patent-rights are subject to seizure and sale on execution; and that, whenever the owner of a copyright of a map causes a plate to be made which is capable of no beneficial use except to print his map, he thereby annexes to the plate the right to use it for printing that map, and also the right to publish and sell the copies when printed; and that when the plate is sold on execution, these rights

¹ 4 Stats. at Large, 488.

pass with the plate, and as incidents or accessories thereto, though no mention is made of them in the sale.

There would certainly be great difficulty in assenting to the proposition that patent and copyrights, held under the laws of the United States, are subject to seizure and sale on execution. Not to repeat what is said on this subject, in 14 How. 531, it may be added, that these incorporeal rights do not exist in any particular State or district; they are coextensive with the United States. There is nothing in any act of congress, or in the nature of the rights themselves, to give them locality anywhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts. That an execution out of the court of common pleas for the county of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island, or New York, will hardly be pretended. That by the levy of such an execution, the entire right could be divided, and so much of it as might be exercised within the county of Bristol, sold, would be a position subject to much difficulty.

These are important questions, on which we do not find it necessary to express an opinion, because, in this case, neither the copyright, as such, nor any part of it, was attempted to be sold. The return of the officer on the execution is, that he seised and sold "one copperplate for the map of the State of Rhode Island." The defendants must, therefore, stand upon the second position assumed by their counsel, that the right to print and publish the map passed by the execution sale with the plate.

There are no special facts in this case to distinguish it from any case of a sale on execution of copper or stereotype plates. It appears that the plaintiff owned the plate; whether he made it, or caused it to be made, or purchased it after it had been made, does not appear.

Nor should the case be confounded with one where the owner of copper or stereotype plates sells them. What rights would pass by such a sale would depend on the intentions of its parties, to be gathered from their contract and its attendant circumstances. In this case, the owner of the copyright made no contract of sale, and necessarily had no intention respecting its subject-matter.

The sole question is, whether the mere fact that the plaintiff owned the plate, attached to it the right to print and publish the map, so that this right passed with the plate by a sale on execution.

And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the

other. It was lawful for any one to make, own, and sell this copperplate. The manufacture of stereotype plates is an established business, and the ownership of the plates of a book under copyright may be, and doubtless in practice is, separated from the ownership of the copyright. If an execution against a stereotype founder were levied on such plates, which he had made for an author and not delivered, the title to those plates would be passed by the execution sale, and the purchaser might sell them, but clearly he could not print and publish the book for which they were made. The right to print and publish is therefore not necessarily annexed to the plate, nor parcel of it.

Neither is the plate the principal thing, and the right to print and publish an incident or accessory thereof. It might be more plausibly said that the plate is an incident or accessory of the right; because the sole object of the existence of the plate is as a means to exercise and enjoy the right to print and publish.

Nor does the rule that he who grants a thing, grants impliedly what is essential to the beneficial use of that thing, apply to this case. A press, and paper, and ink, are essential to the beneficial use of a copperplate. But it would hardly be contended that the sale of a copperplate passed a press, and paper, and ink, as incidents of the plate, because necessary to its enjoyment.

The sale of a copperplate passes the right to such lawful use *thereof as the purchaser can make, by reason of the [* 453] ownership of the thing he has bought; but not the right to a use thereof, by reason of the ownership of something else which he has not bought, and which belongs to a third person. If he has not acquired a press, or paper, or ink, he cannot use his plate for printing, because each of these kinds of property is necessary to enable him to use it for that purpose. So, if he has not acquired the right to print the map, he cannot use his plate for that purpose, because he has not made himself the owner of something as necessary to printing as paper and ink, and as clearly a distinct species of property as either of those articles. He may make any other use of the plate of which it is susceptible. He may keep it till the expiration of the limited time, during which the exclusive right exists, and then use it to print maps. He may sell it to another, who has the right to print and publish, but he can no more use that right of property than he can use a press, or paper, which belongs to a third person.

The cases mentioned at the bar, in which incorporeal rights have been held to pass with corporeal property, do not apply.

By the levy of an execution on a mill, the incorporeal rights actually annexed to the mill, and necessary to its use, pass with the mill.

So does what is parcel of the mill, though temporarily removed from it—as a mill-stone, which has been taken from its place to be picked. These, and many other such cases, are collected in Broome's Legal Maxims, 198, 205.

But the right in question is not parcel of the plate levied on, nor a right merely appendant or appurtenant thereto; but a distinct and independent property, subsisting in grant from the government of the United States, not annexed to any other thing, either by the act of its owner or by operation of law.

For these reasons, as well as those stated in 14 How., our conclusion is, that the mere ownership of a copperplate of a map, by the owner of the copyright, does not attach to the plate the exclusive right of printing and publishing the map, held under the act of congress, or any part thereof; but the incorporeal right subsists wholly separate from and independent of the plate, and does not pass with it by a sale thereof on execution.

The next question is, whether the complainant can have a decree in accordance with the prayer of his bill, for the penalties imposed by the 7th section of the act of February 3, 1831. The bill prays specifically for a decree for these penalties. We speak of the forfeiture of the printed copies, as well as of the sum of \$1 for each sheet unlawfully printed, as penalties; for, under the laws of the United States, it is clear that the complainant can have no title to either of them, except by way of penalty.

[* 454] *There being no common law of copyright in this country, whatever rights are possessed by the proprietor of the copyright must be derived from some grant thereof, in some act of congress, either *nominatim* or by a satisfactory implication; and, looking to the act of congress applicable to this subject-matter, it appears that the rights claimed by this bill are expressly conferred by way of forfeiture. Its language is: "Then such offender shall forfeit the plate or plates on which such map, &c., shall be copied, and also all and every sheet thereof so copied or printed as aforesaid, to the proprietor or proprietors of the copyright thereof; and shall further forfeit \$1 for every sheet of such map, &c., which may be found in his or their possession, printed, &c., contrary to the true intent and meaning of this act; the one moiety thereof to the proprietor or proprietors, and the other moiety to the use of the United States, to be recovered in any court having competent jurisdiction thereof."

In the case of *Colburn v. Simms*, 2 Hare, 554, Mr. Vice Chancellor Wigram came to the conclusion, that since the decision of the house of lords in the case of *Miller v. Taylor*, the right to a decree for the delivery up of copies must be rested by the complainant upon

some statute provision ; and that inasmuch as courts of equity do not enforce forfeitures by an exercise of their ordinary jurisdiction, such a jurisdiction also must be derived from an act of parliament. And though the eighth section of the act of 1 and 2 Vict. c. 59, as well as the preceding act of 54 Geo. III. c. 156, § 4, allows the forfeited copies to be recovered in "any court of record in which an action at law, or a suit in equity, shall be commenced by such author or authors, or other proprietor or proprietors," &c.; yet it was admitted, in *Colburn v. Simms*, that no such order had ever been made, *in invitum*, in a court of equity. It is a significant fact that congress, in legislating on this subject, though manifestly acquainted with the phraseology of the act of Geo. III., and though in some particulars it adopted that phraseology, yet omitted to confer upon courts of equity power to enforce either of the forfeitures provided for, but left them to be recovered "in any court having competent jurisdiction thereof." And the only equitable jurisdiction, as to copyright, conferred upon the courts of the United States, is by the act of February 15, 1819,¹ which gives original cognizance to the courts of the United States, as well in equity as at law, of cases arising under any law of the United States granting to authors or inventors the exclusive right to their respective writings, inventions, and discoveries; and, upon any bill in equity filed by any party aggrieved in any such case, shall have authority to grant injunctions according to the course and principles of courts of equity, to prevent the violation of the "rights of any authors or inventors secured to them [* 455] by any laws of the United States, on such terms as the said courts may deem fit and reasonable. Though the substance of this enactment is incorporated into the 17th section of the patent act of July 4, 1836,² so far as it related to inventors, and so far as it related to the subject of patent-rights, is no longer in force, *proprio vigore*, yet, so far as it gave cognizance to the courts of the United States of cases of copyright, it still remains in force, and is the only law conferring equitable jurisdiction on those courts in such cases; for the 9th section of the act of February 3, 1831, protects manuscripts only.

There is nothing in this act of 1819 which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights. The prayer of this bill for the penalties must therefore be rejected.

The remaining question is, whether there ought to be a decree for

¹ 3 Stats. at Large, 481. ² *Ib.* 124.

an account of the profits. The complainant has not prayed for such an account, nor have the defendants stated one in their answer; but the bill does pray for general relief.

The right to an account of profits is incident to the right to an injunction in copy and patent right cases. *Colburn v. Simms*, 2 Hare, 554; 3 Dan. Ch. Pr. 1797. And this court has held, in *Watts et al. v. Waddle et al.* 6 Pet. 389, that, where the bill states a case proper for an account, one may be ordered under the prayer for general relief. See also 2 Pet. 612; 14 *ibid.* 156; 16 *ibid.* 195; 9 How. 405.

The decree of the circuit court must be reversed, and the cause remanded to the circuit court, with directions to award a perpetual injunction as prayed for in the bill, and to take an account of the profits received by the defendants from the sales of the map.

SAMUEL H. CARPENTER, acting Executor, and CHARLES WILKINS SHORT and J. CLEVES SHORT, Executors named and Residuary Legatees in the Will of WILLIAM SHORT, deceased, Plaintiffs in Error, v. THE COMMONWEALTH OF PENNSYLVANIA.

17 H. 456.

A law of Pennsylvania, passed after the death of one of its citizens, the effect of which is to compel his executors to pay from property in their hands to be administered in Pennsylvania, a tax on property out of that State, bequeathed to citizens of other States, is not an *ex post facto* law, within the meaning of the constitution of the United States.

ERROR to the supreme court of Pennsylvania. The case is stated in the opinion of the court.

Ewing and *Hart*, for the plaintiffs.

Hood and *Scott*, contra.

[* 461] * CAMPBELL, J., delivered the opinion of the court.

The legislature of Pennsylvania, in 1826, adopted a law by which all inheritances, "being within this commonwealth," which, by the intestacy or the will of any decedent, should devolve "upon any other than the father, mother, wife, children, or lineal descendants" of such person, should be subject to the payment of a tax, now fixed at five per cent. *Purd. Dig.* 138, § 1.

The assessments under this act were confined to the property which might be within the commonwealth. *The Commonwealth v. Smith*, 5 Barr. 142.

In March, 1850, by an explanatory act, it was declared that the words "being within this commonwealth, shall be so construed as to

relate to all persons who have been, at the time of their decease, or now may be, domiciled within this commonwealth, as well as to estates; and this is declared to be the true intent and meaning of this act."

William Short, a citizen of Pennsylvania, died within the State a few months previously to the passage of this act, leaving his property to friends and collateral relations, the principal of whom, the residuary legatees, reside beyond the limits of the State. The will was proven, by a resident executor, in December, 1849, before the register's court in Philadelphia, and a settlement was made with that court in June of the following year. In that settlement, the executor represented that a portion of the estate, consisting of securities, stocks, loans, and evidences of debt and property, was not within the commonwealth, and offered to pay the tax for the property within, under the act of 1826, and denied the validity of the assessment under the act of 1850. The tax was assessed upon the entire personal estate, without reference to its locality, by the court, and its judgment upon this subject was affirmed by the supreme court, to which it was removed by *certiorari*. That court says: "More [* 462] pointed words to make the act (of 1850) retrospective, could not be chosen; and it will scarce be said the legislature had not power to make it so, at least while the assets remain in the hands of the executor as administrator. No clause of the constitution forbids it to extend a tax already laid, or to tax assets not taxed before; and, in establishing its peculiar interpretation, it has only done indirectly what it was competent to do directly." The supreme court thus interprets the act of 1850 as if it read: "That assets in the hands of an executor, for distribution among the collateral relations of or strangers to the decedent, shall be subject to a tax of five per cent."

This court has no authority to revise the act of Pennsylvania, upon any grounds of justice, policy, or consistency to its own constitution. These are concluded by the decision of the public authorities of the State. The only inquiry for this court is, does the act violate the constitution of the United States, or the treaties and laws made under it?

The validity of the act, as affecting successions to open after its enactment, is not contested; nor is the authority of the State to levy taxes upon personal property belonging to its citizens, but situated beyond its limits, denied. But the complaint is, that the application of the act of 1826, by that of 1850, to a succession already in the course of settlement, and which had been appropriated by the last will of the decedent, involved an arbitrary change of the existing laws of inheritance to the extent of this tax, in the sequestration of

Carpenter v. Commonwealth of Pennsylvania. 17 H.

that amount for the uses of the State. That the rights of the residuary legatees were vested at the death of the testator, and from that time those persons were non-residents, and the property taxed was also beyond the State; and that the State has employed its power over the executor and the property within its borders, to accomplish a measure of wrong and injustice. That the act contains the imposition of a forfeiture or penalty, and is *ex post facto*. It is, in some sense, true that the rights of donees under a will are vested at the death of the testator; and that the acts of administration, which follow, are conservatory means, directed by the State to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this would justify criticism, and perhaps censure. But until the period for distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile, as that where the distribution should be made. The will of the testator is proven there, [* 463] and his executor receives his authority to collect * the property, by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are subordinate to the conditions, formalities, and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control, at the period of distribution. If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the constitution and laws of the United States to prevent it. *Ennis v. Smith*, 14 How. 400; *In re Ewin*, 1 Cr. & Jer. 151; 1 Barb. Ch. R. 180; 6 W. H. & G. Cy. R. 217; 21 Conn. 577.

The act of 1850, in enlarging the operation of the act of 1826, and by extending the language of that act beyond its legal import, is retrospective in its form; but its practical agency is to subject to assessment property liable to taxation, to answer an existing exigency of the State, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And, as the supreme court has well said, "in establishing its peculiar interpretation, it (the legislature) has only done indirectly what it was competent to do directly."

But if the act of 1850 involved a change in the law of succession, and could be regarded as a civil regulation for the division of the estates of unmarried persons having no lineal heirs, and not as a fis-

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cal imposition, this court could not pronounce it to be an *ex post facto* law, within the 10th section of the 1st article of the constitution. The debates in the federal convention upon the constitution show that the terms "*ex post facto* laws" were understood in a restricted sense, relating to criminal cases only, and that the description of Blackstone of such laws was referred to for their meaning. 3 Mad. Pap. 1399, 1450, 1579.

This signification was adopted in this court shortly after its organization, in opinions carefully prepared, and has been repeatedly announced since that time. *Calder v. Bull*, 3 Dall. 386; *Fletcher v. Peck*, 6 Cranch, 87; 8 Pet. 88; 11 *ibid.* 421.

The same words are used in the constitutions of many of the States, and in the opinions of their courts, and by writers upon public law, and are uniformly understood in this restricted sense. 3 N. H. 375; 5 Mon. 133; 9 Mass. 363; 6 Binn. 271; 4 Geor. 208.

The plaintiff's argument concedes that his case is not within the scope of this clause of the constitution, unless its limits are *enlarged to embrace civil as well as criminal cases; and [* 464] he insists that the court should depart from the adjudications heretofore made upon this subject. But this cannot be done. There is no error in the record, and the judgment of the supreme court is affirmed.

JAMES RHODES, Complainant and Appellant, v. WILLIAM B. FARMER, WILLIAM FELLOWS, and CORNELIUS FELLOWS.

17 H. 464.

A question of fact as to the assignment of a judgment in whole or in part.

APPEAL from the district court of the United States for the northern district of Mississippi. The facts are stated in the opinion of the court.

Phillips, for the appellant.

Bibb, contra.

* M'LEAN, J., delivered the opinion of the court. [* 465]

This is an appeal in chancery, from the district court of the United States for the northern district of Mississippi.

Rhodes, the complainant, recovered two judgments, in 1850, against Sneed, Wright, James E. Farmer, and William B. Farmer, in the district court—one for the sum of \$1,308.68, the other for \$3,179.19—on which executions were issued and returned, *nulla bona*. Prior

to this, W. and C. Fellows, in the name of McKewen, King, and Company, had recovered a judgment against James Strong and others, for \$3,937.75, in the same court; and Strong, with the view of placing his property beyond the reach of the judgment, conveyed it to his wife. This conveyance, on an issue being made, under the practice of Mississippi, was set aside.

In the trial of the above issue, the complainant states it appeared in proof that William B. Farmer was the owner of the judgment against Strong and others, it having been assigned to him by W. and C. Fellows; and the complainant alleged that his judgment against Farmer, being unsatisfied, was a lien in equity upon the interest and claim of William B. Farmer, to the judgment assigned to him. And the complainant prayed that said judgment might be held by Farmer and W. and C. Fellows, subject to his judgments, and that they might be enjoined from paying it over, &c.

William B. Farmer, in his answer, admits that the judgments against him had been obtained, and that executions on them had been returned, *nulla bona*. He denies that the judgment against Strong was ever sold to him; but he states that, in 1848, being sued for a large debt, which he supposed to belong to Strong, and wishing to procure a set-off, he applied to W. and C. Fellows for [* 466] * the control of said judgment, offering to pay them three fourths of the amount that he might realize of the judgment, should he be able to use it as a set-off, which was agreed to by them; and that he executed a penal bond to pay to the said W. and C. Fellows three fourths of the amount so recovered on their judgment.

Defendant also states that the complainant received from James E. Farmer, a co-defendant, a sum of money, on the receipt of which he released the judgments; and the defendant submits, whether such release does not exonerate the other defendants.

He also states that he had made a verbal assignment of the judgment to William Cathron, as an attorney, for collection; and he submits whether the judgment can be made liable by the complainant to the satisfaction of his judgments. Other matters are set up in the answer, and he prays that the answer may be considered a cross-bill, &c.

The condition of the penal bond, given to W. and C. Fellows, stated that they had transferred to Farmer the judgment against Strong *et al.* for the sum \$3,937, subject to credits of about \$763. Now, if the said obligors shall pay to W. and C. Fellows, or their assigns, in two equal instalments, on the 27th of January, 1849, and on the 27th of January, 1850, three fourths of the amount which may

be secured or realized by said Farmer out of said judgment, bearing interest at 6 per cent., deducting costs and attorney's fees which may be incurred, &c., then the obligation to be void.

In their answers, W. and C. Fellows deny that their co-defendant, William B. Farmer, is the owner of the whole of their judgment against Strong and others, but admit that he has an interest of one fourth part, &c.

During the pendency of this suit, the following receipt was given by John S. Topp, counsel for the complainant:—

“June 9, 1852. Received of Messrs. Boston and Stearns, \$1,052.59, being the one fourth part of the balance left in the marshal's hands, in the case of W. and C. Fellows v. Strong and Wife, after deducting \$700 for fees, as provided for in the within agreement.”

The district court, in its decree, says: “It appearing to the court that from the written admissions of Mr. Topp, solicitor for the complainant, since his filing the bill in this cause, recovered one fourth of the amount of the judgment of W. and C. Fellows v. James Strong and Mary A. Strong, his wife, which is enjoined in this cause, and that the complainant is entitled to no further relief in the premises, the injunction was dissolved, and the bill dismissed at the complainant's costs.”

* The judgment of W. and C. Fellows v. Strong, was as- [* 467] signed to Farmer without condition, and it is contended that parol evidence was not admissible to alter the terms of the assignment.

There is a good deal of testimony on the contract of assignment. Some of the statements are somewhat conflicting, but they are reconcilable; and the result of the whole is, that the assignment was made of the judgment to enable Farmer to use it by way of set-off to a demand against him which he supposed belonged to Strong. But it was understood that Farmer should have one fourth of the amount recovered from Strong, after deducting the costs for his labor and trouble in collecting the money, and for the payment of the residue of the judgment he gave bond and security.

The assignment of the judgment was good in equity, and though absolute on its face, the bond given expressed the conditions, and showed that Farmer's interest in the judgment against Strong extended only to one fourth part of it, after deducting costs.

The bill of the complainant is in the nature of a bill for a specific execution of the assignment of the judgment, and in such a case parol evidence is admissible to rebut or explain in equity. But the penal bond given to W. and C. Fellows, by Farmer, with Brown as security, sufficiently explains the transaction.

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The judgments obtained by the complainant against William B. Farmer and others, constituted no lien, equitable or legal, on the judgment against Strong, after it was assigned to Farmer; and no relief could be given to the complainant against the assigned judgment, beyond the equitable interest of Farmer. He is represented to have been insolvent at the time the decree was entered. As one fourth of the judgment, after paying costs, was paid to the complainant before the decree, we think that the decree of the district court dismissing the bill at the complainant's costs, was correct.

The defendants were not liable to pay more than one fourth of the judgment; and as that amount was paid, about the time it was collected on the judgment against Strong, the defendants were not in default.

There is no evidence of a payment to the complainant by James E. Farmer, a co-defendant of William B. Farmer, on which a release of the judgments was executed by the complainant, as alleged in Farmer's answer. Nor is there any ground of defence, from the alleged verbal agreement with Cathron, who, as an attorney, was employed to collect the judgment against Strong.

The complainant, both in prosecuting the suit in the district court, and also by his appeal to this court, sought to recover the whole amount of the judgment against Strong, or at least so much of it as would satisfy his two judgments against Farmer and others. But he can in this mode of proceeding reach only the equity of his judgment debtor in the assigned judgment; and having received that, he can claim nothing more. The decree of the district court is affirmed, at the costs of the complainant.

ROBERT WICKLIFFE, Administrator, with the Will annexed, of **LUKE TIERNAN**, deceased, Complainant and Appellant, *v.* **BENJAMIN EVE**, in his own Right, and as Administrator of **JOSEPH EVE**, deceased, **RICHARDSON ADAMS**, Executor of **RANDOLPH ADAMS**, deceased, **ROBERT P. LETCHER**, **JAMES BALLINGER**, and **FRANKLIN BALLINGER**.

17 H. 468.

A bill which states that the complainant had an interest in the subject-matter of a former suit in equity, applied to be admitted a party, was refused, and a decree made in fraud of his rights, and praying to have that decree set aside, &c., is an original bill, and not a bill of review, and the complainant must be competent to sue all the defendants.

APPEAL from the circuit court of the United States for the district of Kentucky. The case is stated in the opinion of the court.

Preston, for the appellant.

Blair, contra.

* CATRON, J., delivered the opinion of the court. [* 469]

In 1822. some of the defendants made two notes, one for \$1,308.44, and one for \$1,383.95, to Luke Tiernan and Sons; one payable the 1st of December of that year, and the other December 1, 1823.

In 1833, suits were brought by the plaintiff, as attorney of the payees, in the United States circuit court for the Kentucky district, and judgments were obtained by default.

No executions to enforce the judgments were put into the marshal's hands till December 15, 1845; and shortly after they were stayed by injunction, at the suit of some of the defendants against Charles Tiernan, the surviving partner, on the ground of payment, and the bar of the statute of Kentucky, for failing to sue out executions within twelve months after judgment; and on the 6th day of May, 1847, the injunction was, by decree of the United States circuit court, made perpetual.

Wickliffe had, in the mean time, brought suit against Luke Tiernan, claiming an indebtedness against him to the amount of about three thousand dollars, but never obtained judgment. He had attached the debt he alleged to be due by the defendants to Tiernan and Sons, and when the injunction suit was pending against the surviving partner, Wickliffe, having obtained letters of administration on the 13th of November, 1846, petitioned to be made a defendant, but the court overruled the motion.

On the 6th of December, 1847, he moved for leave to file a bill of review on the same ground, but the court also refused; and the present suit was brought to set aside the decree enjoining execution of the two judgments, on the ground that the decree in favor of Eve and others was obtained by fraud, through the connivance of Charles Tiernan, the defendant. The bill alleges, among other things, that Charles Tiernan was largely indebted to his father, and had assigned his interest in the judgments to him, and had become bankrupt. There is no averment in the bill that the partnership debts of Luke Tiernan and Sons had been paid; nor is there any averment that the complainant and defendants were citizens of different States.

Wickliffe attempted to have himself made a defendant to the suit of John G. Eve and others against Charles Tiernan, on the assumption that Luke Tiernan was indebted to him, Wickliffe, and he claimed a right to have part of the amount due to him from Luke

Tiernan satisfied out of the moneys he alleged were due to Luke Tiernan and Sons from Eve and others. Charles Tiernan, being the surviving partner of the firm, had the sole right to defend the suit, as he represented the partnership property; in regard to which, the administrator of Luke Tiernan had a right to come into a court [* 470] of equity by bill, to coerce the * surviving partner to settle, and pay the debts of the firm with the joint property; and after the creditors of the partnership were satisfied, then Luke Tiernan's administrator might have come in on a bill, properly framed, for one third of the surplus, or as much more as Luke Tiernan was in advance to the firm. This familiar doctrine is well stated by Mr. Justice Story, in his work on Partnership, §§ 97, 347.

But the bill before us claims no relief in this form; the complainant asks that the decree releasing Eve and others may be set aside as fraudulent, and the balance due on Eve's debt may be decreed to him, as administrator of Luke Tiernan; and in this capacity he seeks to retain for himself, and subject the property of the firm to pay the debts of an individual partner. Charles Tiernan is no party to this proceeding, and as he was not brought before the court, there could be no jurisdiction taken of the subject-matter; he being legal owner of the *chose in action* claimed, if the claim had any existence.

The bill was dismissed in the circuit court, because the complainant and the defendants were citizens of Kentucky, and therefore the court declared it had no jurisdiction, for want of proper parties. To obviate this objection, it is insisted here, on the part of the appellant, that this is a bill of review of the proceeding in the cause of John G. Eve and others, against Charles Tiernan. The appellant having been refused the privilege to file a bill of review, he then filed this original bill, impeaching the decree for fraud; and to this bill none but citizens of Kentucky were parties.

It is manifestly an original bill, within the description given by Mr. Justice Story's Eq. Plead. § 404, and being so, the circuit court had no jurisdiction of the parties.

It is ordered that the decree, dismissing the bill, be affirmed.

ZACHARY PULLIAM, Executor of AMOS ALBRITTON, Plaintiff in Error,
v. ALEXANDER OSBORNE, Administrator of SAMUEL WOODWARD.

17 H. 471.

Where coördinate liens are obtained by one judgment in a State, and another in a United States court, the seizure by a sheriff, under an execution on the state judgment, gave priority to the lien of that judgment.

ERROR to the district court of the United States for the middle district of Alabama. The case is stated in the opinion of the court.

Badger, for the plaintiff.

No counsel *contra*.

* CAMPBELL, J., delivered the opinion of the court. [* 474]

This was an issue in the district court, under a statute of Alabama, Clay's Digest, 213, §§ 62, 64, for the trial of the * right to property taken under an execution from that court, [* 475] in favor of the appellee, and claimed by the testator of the appellant, as belonging to him, and not to the defendant in the execution.

It appeared on the trial that, at the delivery of the execution to the marshal, in favor of the appellee, the property belonged to the defendant, and that the levy was made before the return day of the writ; but that, before this levy, the property had been seized and sold to the claimant, by a sheriff in Alabama, under executions issued from the state courts, upon valid judgments, after the *teste* and delivery of the executions from the district court.

The district court instructed the jury, that a sale under a junior execution from the state court did not divest the lien of the execution from the district court, and that the writ might be executed, notwithstanding the seizure and sale under the process from the state court.

The lien of an execution, under the laws of that State, commences from the delivery of the writ to the sheriff, and the lien in the courts of the United States depends upon the delivery of the writ to their officer. But no provision is made by the statutes of the State or United States for the determination of the priorities between the creditors of the respective courts, state and federal. They merely provide for the settlement of the priorities between creditors prosecuting their claims in the same jurisdiction.

The demands of the respective creditors, in the present instance, were reduced to judgments, and the officers of either court were invested with authority to seize the property.

The liens were, consequently, coördinate or equal; and, in such cases, the tribunal which first acquires possession of the property, by the seizure of its officer, may dispose of it so as to vest a title in the purchaser, discharged of the claims of creditors of the same grade.

This court applied this principle (*Williams v. Benedict*, 8 How. 107) to determine between judgment creditors in a court of the United States, and an administrator holding under the orders of a probate court of a State; in *Wiswall v. Simpson*, 14 How. 52, in favor of a receiver holding under the appointment of a court of chancery of a State and a judgment creditor; in *Peale v. Phipps*, 14

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How. 368, in favor of a trustee in possession, under the order of a county court, against such a creditor; and in *Hagan v. Lucas*, 10 Pet. 400, between execution creditors issuing from state and federal jurisdictions. The same principle has been applied, in several state courts, in favor of the purchasers at judicial sales of steam-
[*476] boats, and other crafts *subject to liens in the nature of admiralty liens. *Steamboat Rover v. Stiles*, 5 Black. 483; *Steamboat Raritan v. Smith*, 10 Mo. 527; 19 Ala. 738; and is recognized in the courts of common law and admiralty in Great Britain. 4 East, 523; 2 Wms. Ex'rs, 888; *The Saracen*, 3 W. Rob.

In Alabama, the *bonâ fide* purchaser at a judicial sale, made to enforce a statutory lien, takes the property discharged of liens of the same description, whether the subject of sale be land or personal property. *Wood v. Gary*, 5 Ala. 43; 12 *ibid.* 838; 11 *ibid.* 426. The propriety of the rule is fully vindicated by the statement in *Hagan v. Lucas*, 10 Pet. 400, where this court says: "A most injurious conflict of jurisdiction would be likely often to arise between the federal and state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, acquires by a levy a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time, by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist; property once levied on remains in the custody of the law, and it is not liable to be taken by another execution in the hands of a different officer, and especially an officer acting under a different jurisdiction."

The instruction of the district court is erroneous, and its judgment is therefore reversed and cause remanded.

20 H. 588.

CHARLES MINTURN, Appellant, v. LAFAYETTE MAYNARD, GILBERT A. GRANT, THOMAS G. WELLS, LUCIEN SKINNER, FREDERICK BILLINGS, CHARLES J. BRENHAM, ISAAC T. MOTT, J. DE LA MONTAGNE, E. M. NEAL, and THOMAS L. CHAPMAN.

17 H. 477.

The admiralty has not jurisdiction over an account between the agent of a steamer and its owners, for moneys paid to their use.

APPEAL from the district court of the United States for the northern district of California. The case is stated in the opinion of the court.

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Brent and May, for the appellant.

Cutting, contra.

* GRIER, J., delivered the opinion of the court. [477]

The respondents were sued in admiralty, by process *in personam*. The libel charges that they are owners of the steamboat *Gold Hunter*; that they had appointed the libellant their general agent or broker; and exhibits a bill, showing a balance of accounts due libellant for money paid, laid out, and expended for the use of respondents, in paying for supplies, repairs, and advertising of the steamboat, and numerous other charges, together with commissions on the disbursements, &c.

The court below very properly dismissed the libel, for want of jurisdiction. There is nothing in the nature of a maritime contract in the case. The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of *assumpsit*, in a common-law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty. Nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.

The case is too plain for argument.

The judgment of the court of admiralty, dismissing the libel for want of jurisdiction, is affirmed, with costs.

THE STATE OF FLORIDA, Complainant, v. THE STATE OF GEORGIA

17 H. 478.

In a suit between Florida and Georgia, to settle a part of the boundary line between those States, the United States, as a proprietor and grantor of lands in the disputed territory, having an interest in the question of the location of the line, the attorney-general, on filing an information, had leave to adduce evidence, written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States.

THE substance of the motion of the attorney-general appears in the opinions of the court and of Justices Curtis and Campbell.

Cushing, (attorney-general,) for the motion.

Badger and Berrien, contra, for Georgia.

Westcott and Johnson, for Florida.

[* 490] *TANEY, C. J., delivered the opinion of the court.

The court proceed to dispose of the motion made by the attorney-general for leave to be heard on behalf of the United States, in the suit between the State of Florida and the State of Georgia.

[* 491] *It appears that the boundary line between these two States is in controversy, and a bill has been filed in this court by the State of Florida to ascertain and establish it.

The attorney-general has filed an information, stating that the United States are interested in the settlement of this line; that the territory in dispute contains upwards of one million two hundred thousand acres of land, and was ceded to the United States by Spain as a part of Florida; and that the United States have caused the whole of it to be surveyed as public land, and sold a large portion of it, and issued patents to the purchasers. And upon these grounds he asks leave to offer proofs to establish the boundary claimed by the United States, and to be heard, in their behalf, on the argument.

The motion is resisted on the part of the States, and the question has been fully argued by counsel for the respective parties. And as it is, in some degree, a new question, and concerns rights and interests of so much importance, we have taken time to consider it.

If the motion was merely to be heard at the argument, there would, we presume, have been no opposition to it on the part of the States. For it is the familiar practice of the court to hear the attorney-general in suits between individuals, when he suggests that the public interests are involved in the decision. And he is heard, not as counsel for one of the parties on the record, but on behalf of the United States, and as representing their interests. This was done in several instances at the last term, where the United States had sold lands as a part of the public domain, which were claimed by individuals under grants alleged to have been made by France or Spain previous to the cession to this country.

In these cases, however, they were argued by the attorney-general upon the evidence produced by the respective parties. No new evidence was offered on behalf of the United States. And the objection now made is, that he cannot be permitted to adduce evidence in the case, unless the United States are parties on the record; and that they cannot, under the provisions of the constitution, become parties in this court, in the legal sense of the term, to a suit between two States.

We proceed to consider this objection.

The constitution confers on this court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and

those in which a State shall be a party. And it is settled, by repeated decisions, that a question of boundary between States is within the jurisdiction thus conferred.

But the constitution prescribes no particular mode of proceeding, nor is there any act of congress upon the subject. And at a very early period of the government a doubt arose [*492] whether the court could exercise its original jurisdiction without a previous act of congress regulating the process and mode of proceeding. But the court, upon much consideration, held, that although congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases, as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred; that it was a duty imposed upon the court; and in the absence of any legislation by congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given.

There was no difficulty in exercising this power where individuals were parties; for the established forms and usages in courts of common law and equity would naturally be adopted. But these precedents could not govern a case where a sovereign State was a party defendant. Nor could the proceedings of the English chancery court, in a controversy about boundaries, between proprietary governments in this country, where the territory was subject to the authority of the English government, and the person of the proprietary subject to the authority of its courts, be adopted as a guide where sovereign States were litigating a question of boundary in a court of the United States. They furnished analogies, but nothing more. And it became, therefore, the duty of the court to mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this, it was, without doubt, one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained.

It is upon this principle that the court appear to have acted in forming its proceedings where a State was a party defendant. The subject came before them in *Grayson v. Virginia*, 3 Dal. 320. And the court there said that they adopted, as a general rule, the custom and usage of courts of admiralty and equity, with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable. And they at the same time passed an order directing process against a State, to be served on the

governor or chief magistrate, and the attorney-general of the State. This was in 1796. And the principle upon which its process was then framed, as well as the mode of service then prescribed, has been followed ever since, with this exception, that in subsequent cases the chancery practice, and not the admiralty, is regarded as [* 493] furnishing the best analogy. But the power and * propriety of deviating from the ordinary chancery practice, when the purposes of justice require it, have been constantly recognized; and were distinctly asserted in the case of *Rhode Island v. Massachusetts*, 14 Pet. 247, and again in the same case, in 15 Pet. 273, and was recognized in the case of *New Jersey v. New York*, 5 Pet. 289.

We proceed to apply these principles to the case before us. It is manifest, if the facts stated in the suggestion of the attorney-general are supported by testimony, that the United States have a deep interest in the decision of this controversy. And if this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this court or anywhere else. Justice, therefore, requires that they should be heard before their rights are concluded. And if this were a suit between individuals, in a court of equity, the ordinary practice of the court would require a person standing in the present position of the United States, to be made a party, and would not proceed to a final decree until he had an opportunity of being heard.

But it is said that they cannot, by the terms of the constitution, be made parties in an original proceeding in this court between States; that if they could, the attorney-general has no right to make them defendants without an act of congress to authorize it.

We do not, however, deem it necessary to examine or decide these questions. They presuppose that we are bound to follow the English chancery practice, and that the United States must be brought in as a party on the record, in the technical sense of the word, so that a judgment for or against them may be passed by the court. But, as we have already said, the court are not bound, in a case of this kind, to follow the rules and modes of proceeding in the English chancery, but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained.

It is evident that this object can be more conveniently accomplished in the mode adopted by the attorney-general, than by following the English practice in cases where the government have an interest in the issue of the suit. In a case like the one now before us, there is no necessity for a judgment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the court, in the present suit, there is no possible mode

by which that decision can be reviewed or reëxamined at the instance of the United States. They would therefore be as effectually concluded by the judgment as if they were parties *on the [* 494] record, and a judgment entered against them. The case, then, is this : Here is a suit between two States, in relation to the true position of the boundary line which divides them. But there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court. For their interests may be different from those of either of the litigating States. And it would hardly become this tribunal, intrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. A suit in a court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country. It is a new case, and requires new modes of proceeding. And if, as has been urged in argument, the United States cannot, under the constitution, become a party to this suit, in the legal sense of that term, and the English mode of proceeding in analogous cases is therefore impracticable, it furnishes a conclusive argument for adopting the mode proposed. For otherwise there must be a failure of justice.

Indeed, unless the United States can be heard in some form or other in this suit, one of the great safeguards of the Union, provided in the constitution, would in effect be annulled.

By the 10th section of the 1st article of the constitution, no State can enter into any agreement or compact with another State, without the consent of congress. Now, a question of boundary between States is, in its nature, a political question, to be settled by compact made by the political departments of the government. And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void, without the assent of congress. This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others. And the right and the duty to protect these interests is vested in the general government.

But, under our government, a boundary between two States may become a judicial question, to be decided in this court. And, when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the

evidence adduced to the court; and that decision, when pronounced, is conclusive upon the United States, as well as upon the [* 495] States that are parties to the suit. * Now, as in a case of compact, it is, by the constitution, made the duty of the United States to examine into the subject, and to determine whether or not the boundary proposed to be fixed by the agreement is consistent with the interests of the other States of the Union; it would seem to be equally their duty to watch over these interests when they are in litigation in this court, and about to be finally decided. And, if such be their duty, it would seem to follow that there must be a corresponding right to adduce evidence and be heard, before the judgment is given. For this is the only mode in which they can guard the interests of the rest of the Union, when the boundary is to be adjusted by a suit in this court. For, if it be otherwise, the parties to the suit may, by admissions of facts and by agreements admitting or rejecting testimony, place a case before the court which would necessarily be decided according to their wishes, and the interest and rights of the rest of the Union excluded from the consideration of the court. The States might thus, in the form of an action, accomplish what the constitution prohibits them from doing directly by compact. Nor is this intervention of the United States derogatory to the dignity of the litigating States, or any impeachment of their good faith. It merely carries into effect a provision of the constitution, which was adopted by the States for their general safety; and, moreover, maintains that universal principle of justice and equity, which gives to every party, whose interest will be affected by the judgment, the right to be heard.

Upon the whole, we think the attorney-general may intervene in the manner he has adopted, and may file in the case the testimony referred to in the information, without making the United States a party, in the technical sense of the term; but he will have no right to interfere in the pleading, or evidence, or admissions of the States, or of either of them. And, when the case is ready for argument, the court will hear the attorney-general, as well as the counsel for the respective States; and, in deciding upon the true boundary line, will take into consideration all the evidence which may be offered by the United States, or either of the States. But the court do not regard the United States, in this mode of proceeding, as either plaintiff or defendant; and they are, therefore, not liable to a judgment against them, nor entitled to a judgment in their favor. We consider the attorney-general as the proper officer to represent the United States in this court; and that the general government, in bringing before us for consideration the rights and interest of the Union in the question

to be decided, does nothing more than perform a duty imposed upon it by the constitution. And, as the mode in which that duty is to be performed * here is not regulated by law, but must [*496] depend upon the rules and regulations prescribed by the court, we shall not embarrass the proceedings by endeavoring to conform them strictly to English precedents and pleadings, and regard the mode in which the information on behalf of the United States has been presented, to be the simplest and best manner of bringing their interest before the court, and of enabling it to do justice to all parties whose rights are involved in the decision.

M'Lean, J., Daniel, J., Curtis, J., and Campbell, J., dissented.

CURTIS, J., dissenting.

It is in accordance with natural justice, and with a principle of jurisprudence, that no one should be affected by a judgment or decree, without an opportunity to present to the court, either by himself or his lawful representative, in some regular and legal course, his allegations and proofs, and to be heard thereon; and, therefore, I should have assented to the application of the attorney-general in this case, and would willingly concur with a majority of the court in the order they direct to be entered, if I did not find it to be subject to objections too grave for me to disregard, and which careful reflection, even under the influence of the great respect I feel for the opinions of my brethren, has not enabled me to overcome.

I will state, as briefly as I can, what these objections are. In doing so, I shall first examine the nature and effect of the application of the attorney-general, to see whether it is in the power of the court to grant it, as made; and I will then consider whether the order directed by the court is subject to the same difficulties, in part or in whole.

That application is, in substance, an *ex officio* information, in which the attorney-general of the United States informs this court of the pendency of a suit here, by the State of Florida against the State of Georgia, wherein there is in controversy a portion of the boundary line between those States; that it appears, from an inspection of the bill of the State of Florida, and of the answer of the State of Georgia, that, if the pretensions of the State of Georgia shall be sustained by this court, the boundary line in controversy will be so run as to include within the territorial limits of that State a tract of land of about one million two hundred thousand acres, which have been considered and treated heretofore as public domain of the United States, and surveyed as such, and much of which has been sold and granted by

the United States, as being part of the territory of East Florida, acquired from Spain.

[* 497] *In support of this information, the attorney-general has filed certain documents and a map; and he prays that, in consideration of the interest and concern of the United States, he may be permitted to appear in the case, and be heard in behalf of the United States, in such time and form as the court shall order.

The case to which this information relates now stands on the original docket of this court, upon a bill filed by the State of Florida and an answer by the State of Georgia. No replication had been put in, and, of course, no proofs taken.

It is quite apparent, therefore, since the case is not now in a condition to be brought to a hearing, and since much time must necessarily elapse, considering the course of the court and the nature of the controversy and the character of the parties, before it can be put into a state to be heard, that this application of the attorney-general is not designed merely to obtain the privilege of taking part in the hearing of the cause, by making an argument at the bar, upon the pleading and proofs as they may exist when the cause may be set for a hearing, if that time shall ever arrive. It seems to me not consistent with that respect which is due to the attorney-general, to suppose that he has caused the States of Florida and Georgia, by their counsel, to appear here, and has called on the court to listen to, and consider elaborate and learned arguments upon questions of constitutional law and general jurisprudence, merely to present the question, whether,—in the contingency that this case should, at some future day, be brought to a hearing, and in the event that, at that time, the interest of the United States should remain as it is now alleged to be,—the court would hear the law officer of the United States, in support of its interests.

Courts of justice make orders and decrees upon actually existing states of fact, not upon what may possibly occur at some period in the future. And this obvious dictate of ordinary prudence is rigidly obeyed by courts of equity, when acting on subjects like that now before the court.

In England, the sovereign has a great number and variety of interests and rights, which may be affected by decrees of courts of equity. As will be more fully stated hereafter, the attorney-general represents the crown in respect of those rights, and no decree affecting them is made until he has had opportunity to become a party to the suit. But the question, whether he is a necessary party, is raised in the same way and at the same time, as the question whether a private person is a necessary party. And, I believe, we should search in

vain for an instance in which any court had made an order in a cause before it was at issue, *that, if it should come to [*498] a hearing, the attorney-general should be heard at the bar.

I have made these observations concerning the nature and objects of this application, because the information does not specify, or in any way indicate, what particular order it is desired the court should pass. If I felt at liberty to understand it simply as an application to be heard at the bar, by way of argument on the pleadings and proofs of the complainant and the defendant, I should think the proper answer would be, that the court would advise thereon when it was made reasonably certain that the cause would be heard. But I am not at liberty so to view this information, not only for the reasons I have suggested, but because the attorney-general, with becoming frankness, has declared, both orally, at the bar, and in his printed brief, that what he desires passes far beyond this. He has thus made known to the court that he seeks to intervene in the cause in behalf of the United States; and he has explained his understanding of the term intervention, and of the effect of an order of the court allowing it, to be, that he is to come into the cause, "not in subordination to the mode of conducting the complaint or defence adopted by one State or by the other, nor subject to the consequences of their acts, or of any possible misleading, insufficient pleading, omission to plead, or admission or omission of fact, by either or both; but free to coöperate with or oppose either or both, and to bring forth all the points of the case according to his own judgment, whether as to the law or the facts; for *ex facto oritur jus*."

Can this, or any thing like this, be allowed, consistently with the constitution and laws of the United States?

In answering this inquiry, it is necessary to determine what would be the relation of the United States to this controversy if the attorney-general were thus admitted. In my opinion, they would thus become substantially and really a party to the controversy. I say substantially and really a party, for I quite agree with the majority of the court in thinking, that this question is not to be decided according to any strict technical rules, or even viewed solely by the light which they impart. As I consider it, the question is one of constitutional law; and though the constitution was framed and intended to operate in connection with those systems of law and equity existing in our country at the time of its adoption, and many terms in it can be correctly understood only by resorting to the interpretation of those terms in those bodies of law, yet I concede that, in examining this question, we are to look to the substance and nature of the relation to the suit, and not merely to forms and names; and, therefore, I have

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[*499] inquired whether, if the attorney-general *be admitted on the record in accordance with the prayer of his information, the United States will be substantially and really a party to this suit? And, in the first place, I think there can be no substantial distinction in this matter between the United States and the attorney-general. If what is done is sufficient to make him a party, the United States is, in substance and in legal effect, a party. The rights and interests which he brings before the court are the rights and interests of the United States. He presents those rights and interests, not as a trustee in whom they are vested; not as specially empowered by law to sue in his own name for the recovery of something belonging to the government; but he acts simply as an attorney and counsellor at law.

The postmaster-general is empowered by law to bring suits in his own name, in the courts of the United States, upon contracts made with him as the head of a department; and the United States, though exclusively interested, is not deemed a party to the controversy. *Osborne v. The Bank of the United States*, 9 Wheat. 855. So an executor or administrator, though he may have no beneficial interest in the cause of action, is deemed the party to the suit for the purpose of jurisdiction. 4 Cranch, 308; 8 Wheat. 668; 12 Pet. 171. But in these and similar cases, the officer or executor has, by law, the legal right of action vested in him.

On the other hand, it has been repeatedly decided, that where a law required a bond to be taken in the name of a public officer, but for the benefit of individuals, as in case of sheriffs' bonds, the person for whose use the suit was brought, and not the obligee in whose name it was brought, was the party to the suit, within the meaning of the constitution. *Brown et al. v. Strode*, 5 Cranch, 303; *McNutt v. Bland*, 2 How. 1; *Huff v. Hutchinson*, 14 *ibid.* 586.

These decisions go much beyond what I maintain in this case. The rights and interests which the attorney-general desires to assert in this case are in no manner and for no purpose vested in him, any more than the rights and interests of the private parties litigating in court are vested in the attorneys and counsel whose names are on the docket, or who argue the causes at the bar.

He is not what was termed, in the cases of *Browne et al. v. Strode*, and the other cases just referred to, a conduit, through whom the remedy is afforded on a contract made in his name. He is simply a law officer of the government, empowered to act for the United States in this court. In such a case, it does not seem to me to admit of a doubt, that whatever is done by him, though in his name, will be done by the United States.

* The case of *Georgia v. Brailsford*, 2 Dall. 402, was a bill [* 500] by "his excellency, Edward Telfair, Esq., governor and commander-in-chief in and over the State of Georgia, in behalf of the said State." The jurisdiction was sustained, as of a suit by the State, and an injunction granted and a trial had at the bar of this court. 4 Dall. 1. Yet, to give the court jurisdiction, a State must be a party on the record. *Osborne v. The Bank*, 9 Wheat. 738. In this case, the court must have considered the State was made a party on the record by a proceeding in its behalf in the name of its chief executive magistrate. So it was declared by the court in the case of *The Governor of Georgia v. Madrazo*, 1 Pet. 122; and in this last-mentioned case it was decided, on great consideration, and after examining all the previous decisions, that a claim filed by the governor of Georgia, in his own name as governor, but in behalf of that State, made the State itself a party to the record, within the meaning of the constitution and laws of the United States.

In *Benton* (district attorney of the United States for the northern district of New York) *v. Woolsey et al.* 12 Pet. 27, the district attorney of the United States for the northern district of New York had filed an information in his own name to foreclose a mortgage belonging to the United States. The case came to this court by appeal. In delivering the opinion of the court, Mr. Chief Justice Taney said: "Some doubts were at first entertained by the court, whether this proceeding could be sustained in the form adopted by the district attorney. It is a bill of information and complaint in the name of the district attorney, in behalf of the United States. But upon carefully examining the bill, it appears to be, in substance, a proceeding by the United States, although in form it is in the name of the officer. And we find that this form of proceeding in such cases has been for a long time used without objection in the courts of the United States, held in the State of New York; and was doubtless borrowed from the form used in analogous cases in the courts of the State, where the State itself was the plaintiff in the suit. No objection has been made to it, either in the court below or in this court, on the part of the defendants, and we think the United States may be considered as the real party, although, in form, it is the information and complaint of the district attorney. But although we have come to the conclusion that the proceeding is valid and ought to be sustained by the court, it is certainly desirable that the practice should be uniform in the courts of the United States; and that, in all suits where the United States are the real plaintiffs, the proceedings should be in their name, unless it is otherwise ordered by act of congress."

* Now it is plain, that the only ground upon which this [* 501]

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proceeding could be sustained, as within the jurisdiction of a court of the United States, was, that an information by a law officer of the government in his own name as such officer, but asserting rights of the United States, is a controversy to which the United States is a party within the meaning of those words in the constitution ; for it was only because the United States was a party to the controversy that the jurisdiction attached. It would have been in conformity with what this decision declares to be the correct practice, if this information, and all proceedings which may ensue thereon, were to be in the name of the United States ; but it is also in conformity with it to say, that though in the name of the attorney-general, for the United States, the United States will thereby be made a party to this controversy, provided what is done is sufficient to constitute any one a party to it. It remains to inquire whether the rights and privileges claimed by the attorney-general in behalf of the United States, if conceded, will make them a party to this controversy.

It seems to me somewhat difficult to reason about so plain a proposition. The attorney-general has already filed an information, alleging the interest of the United States, and showing what it is and how it arises. If an order is made thereon, allowing him to appear and support those allegations, the United States will appear on the record asserting their interest in this controversy. They will so appear, that they may enjoy the rights of a party to be heard by proper allegations and proofs, and by arguments at the bar. The process of the court must be accorded to them to obtain their proofs, in those modes and under those sanctions appropriated exclusively to the taking of evidence to be used in judicial controversies. They are to be at liberty to oppose the pretensions of the other parties, and to assert and maintain their own, in a regular course of judicature ; and they, in common with the others, are to be bound by the decree, which is to be the product of their allegations, proofs, and arguments, as well as of those of the two States of Florida and Georgia.

If all this does not make the United States a party to this controversy, it would be difficult for me to show that it has any parties.

Under our system of jurisprudence, what constitutes a person a party to the record ? Is it not sufficient, if it appears by the record that he had a direct interest in the subject-matter of the suit ; that he placed before the court in his own name, and not in the name of another, by some appropriate allegations, his claim or defence ; that he introduced legal evidence in support of that claim or defence, which was heard by the court ; that he * was heard

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by his counsel; that his rights, and what he presented to the court in support of them, were taken into consideration by the court in making a decision; and that these rights were intended to be bound, and in point of law are bound, by the decree? All this must appear from this record, if the United States be allowed to do what has been prayed for. .

The attorney-general, in his very learned and able argument, has referred the court not only to the practice of some of the courts of England, but to the Roman law, and to the modern civil law of the continent of Europe, concerning intervention. This practice differs, in details, in the different countries. But so far as I have been able to examine, a third person who comes in after the institution of a suit, to assert a right of his own involved in the controversy, is considered and expressly denominated a party. The definition, given in the Code of Practice of Louisiana, which is substantially borrowed from the French Code of Procedure, is: "An intervention, or interpleader, is a demand by which a third person requires to be permitted to become a party in a suit between other persons, either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff; or it may be lawful for him, where his interest requires it, to oppose both." See, also, Merlin, Rep. vol. 16 and Recueil, voc. Intervention, Dalloy Dic. s. vocc.

The English law is equally clear. When the attorney-general is brought into a suit between third persons as the representative of the crown, and to protect its rights, though possessed of some privileges which do not belong to private persons, he is not only called a party, but he is treated as one. He is attended with a copy of the bill, and if he does not appear it is considered as a *nihil dicit*; and if he does appear and fails to answer, the bill is taken *pro confesso* as against the crown. 1 Dan. Ch. Pr. 169, 170, 531, 548.

Indeed, I am not aware of any case, either in equity or admiralty, or at law, under particular statutes, in which a third person who intervenes, is not considered and called a party. The ground upon which a decree *in rem* is held to bind all persons, is, that every one having an interest has a right to make himself a party to the cause, and that the seizure or arrest of the thing gives notice to all concerned, of the pendency of the proceedings, and thus enables them to become parties. In *Rose v. Himely*, 4 Cranch, 277, Chief Justice Marshall states this familiar rule: "Those on board a vessel are supposed to represent all who are interested in it; and if placed in a situation which enables them to take notice of any proceedings against a vessel and cargo, *and enables them to as- [* 503]

sert the rights of the interested, the cause is considered as properly heard, and all concerned are parties to it."

And so in equity. Those who come in, even before the master are, as Lord Redesdale says, Mit. Pl. 178, 179, considered parties to the cause in the subsequent proceedings.

With great respect for my brethren, I cannot agree that the reasons advanced by them, why the United States will not be a party to the record are sufficient. Those reasons I understand to be, that no decree will be made against the United States, and that the attorney-general will not be allowed to interfere in any way with the pleadings, or proofs, of either the State of Florida or Georgia. As to the first of these reasons, it is certainly true, that no decree will be made against the United States, in form, or by name; but, if I understand the opinion of the majority of my brethren, they consider as I do, that substance, and not form, is to be looked to in this case; and that the only inducement for allowing the United States to be heard is, that, from the nature of the controversy, all the world must necessarily be precluded by the decree from disputing the correctness of the line of boundary fixed by it. Whether the United States shall or shall not be named in the decree, would seem, therefore, to be formal rather than substantial, since their rights and duties will be the same, whether named or not. In either case, the decree will conclusively operate thereon.

And as to the other reason, that the attorney-general is not to be allowed to interfere with the pleadings or evidence of the States of Florida or Georgia, I must say, with deference for the better opinion of my brethren, that it seems to me to be a restriction, which, while it still leaves the United States a party to the suit, deprives them of some of the rights of a party, and to that extent fails to carry out the very principle which requires them to be heard at all.

The right to have this case stated by Florida in the bill, so as to present it in its entire substance, is a substantial and important right of the United States. If the case is defectively or untruly stated there, the decree must be affected thereby, for Georgia has the right to insist that the decree shall conform to the bill. An explicit and full answer to the bill is also material to the United States, that they may know what is to be relied on, and what proofs and arguments are necessary to be adduced. The power to cross-examine witnesses, and to except to proofs when offered, has been deemed essential to the administration of justice. I would respectfully ask, upon what principle known to our jurisprudence, are the United

States to be deprived of these rights, if they are admitted
[* 504] at all to contest the claims of Georgia? * If both Florida

and Georgia may cross-examine the witnesses of the United States, and except to their proofs, what intrinsic propriety or judicial reason can there be, why the latter may not cross-examine the witnesses and except to the proofs of the former?

With submission to a majority of my brethren, I confess it seems to me, that, to deprive a party of some rights, which, under all systems of law known to us, are deemed essential, while other rights are allowed to him which can be conceded only to a party to the controversy, proves the embarrassment which was felt in carrying out the idea of making him a party, but does not overcome the difficulty or even avoid it. It appears to me to declare, in effect, justice requires that you should be admitted as a party on this record; but, in order to make some distinction between yourself and other parties, you shall not enjoy all the rights of a party; and the particular rights which you are not to enjoy are, the power of excepting to the pleadings and proofs of the other parties.

This is not satisfactory to my mind. Whether I consider only the substantial relations of the United States to the controversy, or the analogous provisions of positive or customary law in our own and other countries, I cannot avoid the conclusion, that if they are admitted upon this record to assert their rights—to show what they are, and how they are involved in this controversy; to maintain them, in the regular course of judicature, by allegation, proof, and argument, against the State of Georgia; to have the process of the court to enable them to do so; to profit by the decree if favorable, to lose by it if adverse—they are a party to this controversy, within the meaning of the constitution of the United States. And this raises the question, which, in my opinion, is a very grave one, whether the constitution permits the United States to become a party to a controversy between two States, in this court?

The judicial power of the United States, extends, among other things, to controversies to which the United States shall be a party—to controversies between two or more States—between a State and citizens of other States or of foreign states, where the State commences the suit, and between a State and foreign states.

In distributing this jurisdiction, the constitution has provided that, in all cases in which a State shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.

I am not aware that any doubt has ever been entertained by * any one, that controversies to which the United States [* 505]

are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789,¹ which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.

There was a case of *The United States v. Yale Todd*, commenced in this court in 1794, which is not reported, but it is stated from the record, by Mr. Chief Justice Taney, in a note to the case of *The United States v. Ferreira*, 13 How. 52. Of this case the note says:—

“The case of *Yale Todd* was docketed by consent in the supreme court, and the court appears to have been of opinion that the act of congress of 1793,² directing the secretary of war and the attorney-general to take their opinion upon the question, gave them original jurisdiction. In the early days of the government, the right of congress to give original jurisdiction to the supreme court, in cases not enumerated in the constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's* case. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the constitution, and that congress cannot enlarge it. In all other cases its power must be appellate.”

The decision of this court, in *Marbury v. Madison*, 1 Cranch, 137, settled this construction of the constitution; and, as stated in this note, no one who has examined the subject now questions it.

We have, then, two rules given by the constitution. The one, that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

It is not to be admitted that there is any real conflict between these clauses of the constitution, and our plain duty is so to construe them that each may have its just and full effect. This is

¹ 1 Stats. at Large, 78.

² *Ib.* 324.

* attended with no real difficulty. When, after enumerating [* 506] the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

And when it says : “ in all cases in which a State shall be a party, the supreme court shall have original jurisdiction,” it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

So that this original jurisdiction, which depends solely on the character of the parties, is confined to the cases in which are those enumerated parties, and those only.

It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court.

But this practical result is far from weakening my confidence in the correctness of the reasoning by which it has been arrived at. The constitution of the United States substituted a government acting on individuals, in place of a confederation which legislated for the States in their collective and sovereign capacities. The continued existence of the States, under a republican form of government, is made essential to the existence of the national government. And the fourth section of the fourth article of the constitution pledges the power of the nation to guarantee to every State a republican form of government ; to protect each against invasion, and, on application of its legislature or executive, against domestic violence. This conservative duty of the whole towards each of its parts, forms no exception to the general proposition, that the constitution confers on the United States powers to govern the people, and not the States.

There is, therefore, nothing in the general plan of the constitution, or in the nature and objects of the powers it confers, or in the relations between the general and state governments, to lead us to expect to find there a grant of power over judicial controversies between the government of the Union and the several States. On the contrary, the agency of courts to compel the States to obey laws of the Union, or to concede to the United States its rights or claims, would naturally be deemed both superfluous and impolitic ; superfluous, because the States can act only through individuals, who are directly responsible, both civilly and criminally, to the laws of the United States, which are supreme, and in the courts of the United States,

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which have jurisdiction to enforce all laws of the United [* 507] States; and * impolitic, because calculated to provoke irritation and resistance, and to excite jealousy and alarm.

It must be remembered, also, that a State can be sued only by its own consent. This consent has been given in the constitution; but only in cases having such parties as are there described. The particular character of the parties to the controversy, into which a State has consented to enter, constitutes not only an essential element in that consent, but it is the sole description of what is agreed to. The State of Georgia has consented to be sued by one or more States, or by foreign states, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more States, or with a foreign state, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly, there is no power existing in this government to enlarge that consent so as to embrace in it any thing to which it does not, by its terms, extend.

I cannot agree that because the State of Georgia consented to be sued by the State of Florida, Georgia thereby consented to the introduction into the controversy of any party whose rights were so involved in the controversy that the court is bound, upon principles of natural justice, to have that party before the court, in order to make a decree.

In the first place, if it be conceded that a third party, not capable of suing a State, or being sued by one, is a necessary party to a controversy between two States, and that the court cannot make a decree without the presence of that party, it would seem to me to be the legitimate inference, that in such a case the States had not consented to be sued. Having consented to be sued, in controversies having certain described parties, it would seem that a controversy which could not be carried on by them was not one to which the consent applies.

So far as I am aware, the other grants of judicial power by the constitution, which depend on the character of the parties, have been so construed. Has it ever been supposed that into a suit between citizens of different States a third party, not competent to sue or be sued, could come or be brought, because he was a necessary party, without whose presence a decree could not be made? Has the doctrine ever been advanced, that when the constitution gave jurisdiction over suits between citizens of different States, it thereby, by implication, authorized that jurisdiction to be extended so as to embrace every person whose rights were so involved in the controversy that the principles of natural justice required him to be heard?

Take the case of a suit between a citizen of Florida and a citizen of Georgia, in the course of which it appears that an *inhabitant of this district, who is not competent to sue or [* 508] capable of being sued, has such an interest in the controversy that the court can make no decree between the parties before them without affecting that interest; has it ever been supposed that there was any implied power granted by the constitution and the 11th section of the judiciary act of 1789 to make him a party, or has the conclusion been that in all such cases the court cannot act at all? The latter, I apprehend, is the settled conclusion. The forty-seventh rule for the equity practice of the circuit courts provides, that if persons who might otherwise be deemed necessary or proper parties to the suit cannot be made so, because their joinder would oust the jurisdiction of the court, as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties. This certainly assumes that there is no implied power, arising out of the necessity of the case, to make them parties, or to bring them into the cause so as to hear and bind them without making them parties. The court is to distribute all the justice it can between the parties over whom it has jurisdiction; but if it can do nothing without the presence of a necessary party, the remedy is not to bring him in, or allow him to come in, but to refuse to act, and leave the parties to terminate their dispute by other means. This is declared by this court in *Hagan v. Walker*, 14 How. 36, and the earlier cases lead to the same conclusion. *Russell v. Clarke's Ex'rs*, 7 Cr. 98; *Cameron v. Roberts*, 3 Wheat. 591; *Wormley v. Wormley*, 8 *ibid.* 451; *Carneal v. Banks*, 10 *ibid.* 188; *West v. Randall*, 2 Mason, 195, 196; *Shields et al. v. Barrow*, *ante*, p. 130, of the present term.

It is true there is a class of cases in which this court has decided that when the jurisdiction of the circuit court, by reason of the character of the parties, has once attached, it is not divested by one of the parties losing the character which entitled him to sue, or subjected him to be sued in the circuit court, or by his death and administration being granted to a citizen who would not have been competent to sue; and further, that when the judgment operated *in rem*, as in a suit in ejectment, no change of the property, *pendente lite*, could prevent the circuit court from exercising its jurisdiction over its own execution. The cases of *Morgan's Heirs v. Morgan*, 2 Wheat. 297; *Mollan v. Torrance*, 9 *ibid.* 537, are of the first class. It was there held that a change of domicile did not defeat the jurisdiction which had once attached. In the case of *Clarke v. Mathewson*, 12 Pet. 164,

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it was held that a bill of revivor was but a continuation of the original suit, and that the jurisdiction having once attached was [* 509] complete, and continued to enable the court to *adjudicate on that subject-matter. In *Dun v. Clarke*, 8 Pet. 1, it was held that the circuit court had jurisdiction of a bill to enjoin the levy of an execution on a judgment in ejectment, though the land had been devised so that all parties were citizens of the same State.

This was upon the ground that the devisee of the land was to be deemed the mere representative of the plaintiff in the judgment, and that as to him the bill was not an original suit, but a proceeding on the equity side of the court to enable the court to control its own execution; and according to the case of *Harris v. Hardeman*, 14 How. 334, the same thing might have been done upon motion on the law side of the court. But the court refused to take jurisdiction over the other parties to the bill who had an interest in the land, or to decide the merits of the controversy, and confined itself to staying the execution of the judgment until the merits could be investigated in a suit in a state court.

It will be seen, I think, that none of these cases rest at all on the ground that there is jurisdiction, by implication, over a third party whose rights are such as to make his presence in the cause necessary. But if they did, they would fall far short of proving that such an implication can be made in this case. The constitution is merely silent concerning the introduction of a third person, not competent to sue or be sued in the courts of the Union, into a suit in the circuit courts; but it is not silent concerning controversies to which the United States is a party. It declares, in effect, that over such controversies this court shall not have original jurisdiction; for it makes its jurisdiction over such controversies appellate, and this, as has been long settled, excludes all original jurisdiction over such controversies, and even prevents congress from conferring it. *Marbury v. Madison*, 1 Cranch, 137. To say that there is an implication that when the United States is a necessary party to an original suit in this court, they can become a party here, would be, in my opinion, not only an extension of the original jurisdiction of this court to a case not described by the constitution as within it, but to a party as to whom we are expressly forbidden to take such jurisdiction.

Nor do I find in the nature and circumstances of this case any such necessity for making the United States a party, as would lay a foundation for the presumption that it must be competent for the court, and consistent with the constitution and laws, to allow it to be done. This is not a broad question, whether in the exercise of the original jurisdiction of this court we are obliged to exclude all third

parties, though they may have the most important rights and interests necessarily involved in the suit. I apprehend no such question arises here. * I do not doubt that in an original [* 510 suit in equity here, between two States, or between a State and a foreign state, or between a State as complainant and individuals, or in a suit affecting ambassadors, other public ministers or consuls, any necessary party may be brought in who is competent to be sued by the plaintiff, or to sue the defendant in that suit in this court. Thus, a State may sue here other States, foreign states, all citizens of other States and of foreign states, and this I believe includes every possible party, except its own citizens and inhabitants of this district, and of the territories, and the United States. Setting aside residents of this district and of the territories, who cannot be deemed of great moment in this particular matter, and citizens of the State bringing the suit, whose rights the constitution evidently considers need no protection from this government, the practical effect of the doctrine I maintain will be found to be confined to the United States. They cannot be made a party to such a suit; and, in my judgment, it is in accordance with the whole plan of the government, as well as with the particular provisions of the constitution concerning the judicial power, that they should not be able to interpose and assume an adverse position to a State, in a judicial controversy in this court. Besides, I do not find in this case any real necessity to make the United States a party, according to the principles of equity law. A court of equity generally requires all persons who have an interest in a suit to be made parties. But it is a familiar rule, that when it is impracticable to bring before the court all interested, it is enough to make such parties as have a common interest with those who are absent. In such a case, the parties who are present represent the rights of those who are absent, and the court proceeds to make its decree, binding the rights of the absent parties, with the same confidence that justice is done as if they were before the court. Story's Eq. Pl. 97, 112.

Now, what is this case? The interest of Florida and that of the United States are identical. That interest is, to have the boundary line fixed as far to the northward as the proofs will allow. It is true, that what Florida seeks is the protection of its rightful jurisdiction as a sovereign State; and what the United States desire is the protection of its title as a landholder, and as the grantor of lands now held by their grantees. But both the political jurisdiction of Florida, and the title of the United States to land acquired from Spain, being coextensive with the territory of Florida, these two parties have a common interest in the subject-matter of this suit; and Florida is, in

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the contemplation of a court of equity, competent to represent the interest of the United States, as an owner of land.

[*511] * This would certainly be true in the case of individual parties, and in my opinion the same rule applies with still greater force to these parties. Florida is a sovereign State, whose suit must be conducted according to the will of its legislature. There is no room for any suspicion of any unworthy motives or conduct in its management. It is a high duty of that State, which it owes to itself, and which will doubtless be discharged to vindicate its jurisdictional rights, and make good its claims to all the territory which comes within its true limits. Though the question is merely where a line should be run, that line carries with it the sovereignty and territorial jurisdiction of States.

On the other hand, the United States is a landholder, whose title may be affected by running the line in one place rather than another. And so will the titles of hundreds of other landholders in this territory, whose interest is precisely the same as that of the United States, in kind, though not in amount. To say that it is necessary for the purposes of justice, that the United States, as the proprietor of lands, should be admitted into this suit to take care lest the State of Florida should omit something by way of pleading or evidence, seems to me to be yielding to an imaginary necessity only.

It is not alleged that the United States has any interest in this controversy except as an owner or grantor of land. Unquestionably there are political considerations, affecting the federal relations of the States, and connected with the extent of their territory, in reference to which the United States has a direct and important interest. This is not only obvious in itself, but is recognized by the constitution in various ways, and, amongst others, by the prohibition of the States to make any compact without the consent of the United States. But the object of this suit is not to change the limits or territory of States, but to ascertain their true and actual boundary; and in this question the United States has no interest, except that justice should be done; an interest which is not of a character to warrant the government in interposing in this case to assist in securing it, any more than in any other case pending in this court. It is suggested that the counsel for the two States may make agreements as to evidence, and other matters respecting the suit, and that the United States ought to be a party, in order to supervise such; but it seems to me that if this were a sufficient reason for making the United States a party in this case, it would apply to all cases between two States; for in all cases such arrangements are as likely to be made as in this one. But if such agreements of counsel respecting the mode of conducting a suit,

between two States, could be deemed compacts between those States, within the restraining clause of the 10th *sec- [* 512] tion of the first article of the constitution, congress, and not the attorney-general, or this court, must sanction them; and there does not seem to be any satisfactory reason why that officer should be connected with the subject. Any agreement fixing the line of boundary, made by the two States and not sanctioned by congress, would certainly not be executed by this court, which is to decree on the existing rights of the parties, and not upon new rights created by a compact, which is not valid without the assent of congress.

But, if the objection to the jurisdiction could be overcome, I should still be of opinion that the attorney-general has not authority to make the United States a party to a suit in this court. That officer possesses no powers derived from usage or implied from the name of his office. His powers are only coextensive with his duty; and that is defined by law to be, "to prosecute and conduct all suits in the supreme court in which the United States shall be concerned." 1 Stats. at Large, 93. It belongs to congress alone to decide in what cases the United States may be made a party in the courts, and to designate the officers by whom they may be made a party. This power congress has exercised. They have conferred upon the district attorneys power to prosecute all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned. 1 Stats. at Large, 92. By the act of May 29, 1830, § 5, (4 Stats. at Large, 415,) the solicitor of the treasury is empowered to instruct the district attorneys in all matters and proceedings appertaining to suits in which the United States are a party, or interested; and by the 10th section of the same act, the attorney-general is to advise with and direct the solicitor. But no authority is conferred by any law, upon any officer, to make the United States a party to any suit, except as a plaintiff or prosecutor. If the United States be interested in a suit against an individual, and he thinks fit to allow the law officer of the United States to prosecute or defend in his name, I know of no objection to it, and it is very often done. It may be suggested, that as the line of boundary will be fixed by the final decree in this case, and as the rights of the United States will thereby be concluded, it can do them no injury, but may be beneficial to them, to be a party to this cause. If this be so, and the court has jurisdiction, it may afford sufficient reason why congress, in its discretion, should authorize an appearance by the attorney-general in behalf of the United States; but it does not enlarge the power of that officer,

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or enable him to do what, in my opinion, no law has conferred on him power to do, — to make the United States a party to an original suit in this court.

[*513] * I am authorized to say that Mr. Justice M'Lean concurs in this opinion.

CAMPBELL, J., dissenting.

I dissent from the opinion of the court. The attorney-general suggests to the court that the State of Florida has filed here an original bill against the State of Georgia, for a settlement of the boundary between the States. He represents that the line claimed by Florida is that which the United States have recognized in the surveys, sales, and other operations of the land-office, and that the line of Georgia diminishes the domain of the United States in Florida twelve hundred thousand acres. "Whereupon, and in consideration of the interest and concern of the United States," he moves for leave "to appear in said cause, and be heard in behalf of the United States, in such time and form as the court will order." The condition of the cause, in relation to which the motion is made, is, that a bill and answer have been filed, but no issue exists, and none of the ulterior stages in the course of the cause attained; nor has there been any motion to the court requiring an examination of the record; and so the motion, as understood from its terms, is certainly premature. But the words, "to appear in said cause and be heard in behalf of the United States," very indifferently explain the significance of the motion. The application is, that the attorney-general may "intervene," "not as a technical party; not as joining with the one or other party; not in subordination to the mode of conducting the complaint or defence adopted by the one State or the other, nor subject to the consequences of their acts, or of any possible misleading, insufficient pleading, omission to plead, or admission or omission of fact, by either party, or both; but to coöperate with or to oppose both or either, and to bring forth all the points of the case, according to his own judgment, whether as to the law or fact."

Though the pleadings show that the interests of the State of Florida and of the United States unite to maintain the same line, the attorney general declines to adopt her suit, lest the condition of the United States might become "precarious," "depending on the discretion of Florida." Nor will the attorney-general file a bill for the United States, nor agree that Florida may make them defendants to hers, for, "that the court is not empowered by the constitution to entertain an original suit" of the kind.

Nor is the motive for this intervention merely that the United

States have a fiscal interest, for the attorney-general suggests that the constitution may be violated by agreements and compacts of States, "entered of record," thereby altering the limits of the States and the structure of the Union, "to the direct [*514] prejudice of the rights, interests, and laws of the United States." These suggestions of possible injustice arising from collusive compacts "entered of record," may be used in any judicial controversy between States, and in this case no evidence of such appears of record; and if such suggestions are heeded, the attorney-general must be constantly an applicant for leave to appear, "not as a technical party," but to employ some oversight, superintendence, or censorship, in suits between States of the Union in this court; and surely, such a claim requires new modes of proceeding, and that now proposed is as peculiar as the claim. The United States appear, with the assertion of their exemption from suit in this court—that the original jurisdiction of the court does not embrace them as a party. Thus declaring independence of process, pleading, and decree, in an original suit in the court, they ask to assist or to assail, at their pleasure, suitors legally before it, and to mould the decree in their case by allegations, evidence, and arguments, introduced without, and perhaps against, their will.

The principle of common law and chancery procedure is, that suits are commenced, prosecuted, and defended by parties to the record in their own names; and the intervention of third persons, not parties, is unknown to the system; and we may affirm confidently, in a case like this, where the party is above and beyond the jurisdiction of the court, such a case is without a precedent. 2 Chitty's Pr. 343. The case of *Pentland v. Quorrington*, 3 My. & C. 249, was that of a trustee, with a full assignment, suing in the name of the assignor, under his power of attorney, and obtaining a decree with notice to the defendant. The nominal plaintiff agreed to an order for delay, and the trustee petitioned for a discharge of the order, and that he might conduct the suit. Lord Cottenham said: "It is a perfectly new equity. The only suit in court is a suit between the defendant and the party (assignor) with whom the contract was made. The plaintiff (assignor) is a party to the arrangement, for effectuating which the present order has been made. Your case is against him, that whereas he has authorized you to carry on this suit in his name, he has entered into the arrangement in question without your concurrence. If I were to make such an order, I should be giving you the right of carrying on this suit against the defendant; I should be displacing the plaintiff on the record." He asked: "Is there any instance of such an interference on the part of the court as you now

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ask?" The eminent solicitor answered: "I admit that I have never seen a case like the present." So in *Drever v. Manderley*, 4 M. & C.

94, an order allowing a third person to control a suit where [* 515] the subject * belonged to him by assignment, but to which he was not a party by any proceeding, was pronounced by the same chancellor "perfectly irregular." The court did not object to the right to the subject of the suit, but to the mode of enforcing the right, by the attempt to control the suit. It required the assignee to exhibit his right by bill, according to the practice of the court, in his own name.

Chief Justice Marshall, in describing the controversies to which the judicial power of the United States extends, says: —

"The words are of well understood and limited signification. It is a controversy between parties which had taken a shape for judicial decision." "To come within the description of a case in law and equity, a question must assume a legal form for forensic litigation and judicial decision. There must be parties come into court who can be reached by its process and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit." 5 Wheat. Ap. 16, 17. The supposed cases of exception cited by the attorney-general, only display the pervading extent of this principle. The instances quoted are rules under the interpleading act of Wm. IV.; landlords defending for tenants in ejectment, vouches in warranty in real actions, bills of interpleader, and suits by representative parties, for or against themselves and others. The cases referred to in courts of common law arise, where a person having the primary right or obligation, is called as a party to the suit to defend that right or to fulfil the obligation; and Lord Coke speaks of the common law instance of a vouchee as "seeming strange" and depending upon "ancient, continual, and constant allowance," (2 Ins. 241;) and so, in interpleading suits, parties, having an adverse interest, are called in by process, as parties, to disengage a neutral who may have the subject of controversy and desires to relinquish it to the owner, when he shall be ascertained, and in representative cases the court acts upon the parties to the record, and determines the case made by them. In this case, the United States admit no representation on their behalf; nor will they undertake the suit of either, nor admit the jurisdiction of the court to treat them as a suitor or party; but contest the authority of the court, are ready to contest or strengthen the positions of either party, and thus they seek, by an anomalous Austrian intervention, to overlook and control the proceedings of the litigants to their own aggrandizement. I find no precedent in the direct and straightforward course of the common law, nor in the statutes altering it, for such a

conduct. I will briefly examine the precedents to which we have been cited, in the codes of procedure of those tribunals which apply the jurisprudence of imperial or *papal Rome. The [* 516] French code permits the interposition of third persons in existing suits. An intervenor may guard a present or future interest, or one certain, contingent, conditional, or collateral, whether pecuniary or personal, or held as a representative. But the inquiry is, how and under what circumstances? And the answer is, by propounding his pretensions to the court as a suitor, inviting contest, alleging proofs, recognizing the jurisdiction of the court, and submitting to its decree. 4 Bioche Dic. de Pro. 590; Louisa. Code, Prac. § 324.

La Cañada, describing the Spanish system, says, there are necessarily two parties to every suit (*actor* and *reo*); and when a third litigant comes, he is called by that number (*tercero*); and because he can oppose either of the parties, or both, the word opposer is added (*tercero opositor*), and his act is called third opposition. If he comes to aid another party in the same right, he accepts the suit as he finds it, and acts conjointly; if his rights are independent, adverse, or paramount, his suit is treated as an original suit, and is conducted as ordinary suits.

The third opposer is technically a party to the cause, and really subject to the decree. La Cañada, Juicos Civiles, 393.

Nor do the admiralty or ecclesiastical codes afford any sanction to the motion. Their jurisdiction being largely *in rem*, they allow persons who have a present and certain claim to the *res*, to propound their interest, if the court has jurisdiction; and by the act the persons become parties to the suit, liable for costs and entitled to appeal. The various codes, then, differ in the time and manner of calling parties before the court. The conditions of a suit at the common law, in general, are settled at its institution, and new and independent parties are not introduced in the subsequent stages. The courts of chancery are more liberal in reference to the time of making parties, and in the extent of their amendments. But in both courts the plaintiff is the *dominus litis*, and third persons may not come in unless he amends the proceedings, or his bill is fitted for it, as being a representative bill. But in the civil, admiralty, and ecclesiastical courts, the power of third persons to propound their rights in the subject of dispute is not so dependent upon the will of the prior parties. But all the codes of procedure unite in this, that persons must come in according to a regular course of procedure, accepting the authority of the court, citing adverse parties to defend, and yielding to whatever decree it may pronounce. The more than imperial claim, in this instance, is for all the faculties of a suitor, without a submission to

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the obligations and restrictions of one. But it is supposed that precedents in the English chancery support a pretension of the [* 517] attorney-general to intervene according to his motion. * An important class of the rights of the crown are represented there by the queen's attorney-general; but how? He is introduced upon the record as a "technical" party to the suit, and the crown is bound by the decree. When the right is adverse to the plaintiff, the attorney-general is made a party by prayer in the bill and the service of a copy. If he fails to appear, it is a *nil dicit*; and if he appears and will not answer, a decree *pro confesso* is taken. Danl. Ch. Pr. 175, 501, 548; Dick. 729; 1 Y. & J. 509.

And courts there exercise over the attorney-general the same authority which they exercise over every other suitor, and he would not be permitted more than any other suitor to prosecute any proceeding merely vexatious, or which had no legal object. *The Queen v. Prosser*, 11 Beav. 306.

The cases cited, of *Penn v. Lord Baltimore*, *Hovenden v. Annesly*, *Attorney-General v. Galway*, and the analogous cases of *Dolder v. Bank of England*, and *Burgess v. Wheat*, Cas. temp. Hard. 332; 2 Sch. & Lef. 617; 1 Moll. 95; 10 Ves. 352; 1 Eden. Ch. 177, are instances of the application of the rule that the court will require the crown to be made a party to the record, under the name of the attorney-general, and that he comes as an actual and obedient party, and not in any illusory and indeterminate form; so that, if the claim of the attorney-general to represent the United States in courts, to the extent claimed, is tenable, the manner of the intervention here is inadmissible.

But I do not admit that the attorney-general has any corporate or juridical character, or that he can be introduced upon the record, in his official name, as an actor or respondent in a suit. His duties are strictly professional duties, and his powers those of an attorney at law. Whatever he may do for the United States, a special attorney might be retained to do; nor can the United States appear in his name, nor by his agency, in cases where they may not be a party.

I have considered this motion upon the concessions of the argument, but the principle lying at the foundation of the case should not form the basis of a judgment merely on the strength of such concessions; and hence I proceed to its examination.

The judicial power of the United States extends to all cases in law and equity arising under the constitution and laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to controver-

sies to which the United States shall be a party; to controversies between two or more States; and between a State or the citizens thereof and foreign states, citizens, and subjects.

* "In all cases affecting ambassadors, &c., and those in [* 518] which a State shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction only." It was not in the design of the constitution to alter or even to modify the existing relations of any of the sovereign parties named in this article, to legal jurisdictions, by enlarging their liableness to suit; but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit or were subject to, according to their pre-existing conditions. Thus, no suit can be commenced against the United States, foreign states or ambassadors, and public ministers; nor are they brought within the jurisdiction of the courts of the United States to any degree beyond that to which they were liable, without this constitutional clause. The construction which allows the exemption of these parties as sovereigns, or their representatives, to operate, sanctions, also, the title of the States to the same right, for they are mentioned in the same clause; and the jurisdiction conceded to this court, in reference to them, is expressed in similar or identical language.

I am aware, that at an early day in the existence of this court, a contrary opinion was expressed by a majority, upon a motion for an interlocutory order in a suit against a State, and I propose to examine the principle established in the controversy, of which that opinion is a part.

While the constitution was under discussion, General Hamilton (Federalist, 81,) said, "that it is in the nature of sovereignty not to be amenable to the suit of an individual without its consent," and contended, "that to ascribe to the federal courts, by mere implication, and in destruction of a preëxisting right of the state governments, a power which would involve such consequences, would be altogether forced and unwarrantable." So, Mr. Madison, replying to the vehement and prophetic denunciations of Patrick Henry, in a careful exposition of the judiciary clause, calmed the Virginia convention by assuring it that "it is not in the power of individuals to call any State into court. The only operation the clause can have is, that if a State should wish to bring a suit against a citizen, it must be brought in the federal court." And the late Chief Justice Marshall supported him, saying: "With respect to disputes between a State and citizens of another State, its jurisdiction has been de-

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cried with unusual vehemence. I hope no gentleman will think a State will be called at the bar of a federal court. It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is to enable * States to recover claims of individuals residing in other States. I contend this construction is warranted by the words." Virginia Deb. 387, 405, 406.

When these assurances from the most accredited friends of the new government were disappointed, by the institution of suits in this court against several of the States, by individual plaintiffs, shortly after the adoption of the constitution, a strong sentiment of wrong was felt, and corresponding indignation expressed. This indignation was not occasioned by any apprehension of consequences to the States as debtors, but by the fact that they supposed their rights to be violated. The history will bear no other interpretation. In *Chisolm v. Georgia*, that State instructed counsel to present to the court a written remonstrance and protestation against the exercise of jurisdiction, but not to argue the cause. The attorney general opened the case of the plaintiff by saying: "He did not want the remonstrance of Georgia, to satisfy him that the motion for judgment was unpopular. Before that remonstrance was read, he had learned from the acts of another State that she too condemned it." The court awarded a writ of inquiry upon the default of the State, sustaining the jurisdiction upon arguments of the utility, justice, and safety of the delegation of the power, and of the diminution and abasement wrought upon the States by the constitution. Mr. Justice Wilson states the case "as one of uncommon magnitude." He says: "One of the parties is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the supreme court of the United States? This question, important in itself, will depend on others more important still; and may perhaps be ultimately resolved into one no less radical than this: Do the people of the United States form a nation?" It is not difficult to perceive the profound misconception of the relations of the States to the Union which dictated his judgment. The following year the legislature of the commonwealth of Virginia adopted a resolution which contains a reply to the question: "Resolved unanimously, that a State cannot, under the constitution of the United States, be made a defendant at the suit of any individual or individuals; and that the decision of the supreme federal court, that a State may be placed in that situation, is incompatible with and dangerous to the sovereignty and independence of the individual States, as the same tends to a general consolidation of these confederated

republics;" and instructed their senators and representatives "to unite their utmost and earliest exertions to obtain such amendments as will remove or explain any clause which can be construed to imply * or justify a decision that a State is compellable [* 520] to answer in any suit by any individual or individuals in any court of the United States."

One month after, January, 1794, the senate was moved by Mr. Strong, of Massachusetts, to adopt the eleventh amendment to the constitution, declaring that the constitution should not be construed to authorize such suits. Various attempts were made in both branches of congress to limit the operation of the amendment, but without effect. It was accepted without the alteration of a letter, by a vote of 23 to 2 in the senate, and 81 to 9 in the house of representatives, and received the assent of the state legislatures. Georgia ratified the amendment as "an explanatory article," her legislature "concurring therewith, deeming the same to be the only just and true construction of the judicial power by which the rights and dignity of the several States can be effectively secured." Thus the supreme constitutional jurisdiction of the United States, the concurrent action of congress, and the state legislatures, expressing a consent nearly unanimous, corrected the opinion of the supreme court, and intercepted its final judgments in these cases, by declaring that the constitution should not be so construed as to allow them.

The reporter of the court closes the volume which contains the case of *Chisolm*, by saying "the writ of inquiry was not sued out and executed; so that this cause and all other suits against States were swept at once from the records of the court by the amendment of the constitution." The course of argument which excluded the jurisdiction of such cases, applies with equal force to suits by foreign states against the States of the Union. And the considerations which forbid suits against the States by individuals, indicated with such clearness in *The Federalist*, form the basis of the luminous and masterly judgments in the English chancery, in the case of *The Duke of Brunswick v. King of Hanover*, 6 Beav. 1; 2 H. L. Ca. 1, where the delicacy, difficulty, and danger of the jurisdiction, and its want of practical value, are fully set forth, and the conclusion announced "that it is a general rule, in accordance with the laws of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the courts there." It is clear the constitution did not abrogate any law of nations, and the only question is whether the States consented to suits without any reciprocal right, or whether the existence of such a power in foreign states could possibly assist any objects of the confederacy. On the contrary, would

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not such a promiscuous grant jeopard its tranquillity and peace?

The answer of Mr. Madison to the Virginia convention is [*521] positive and direct. "I do not *conceive," he says, "that any controversy can ever be decided in these courts, between an American and foreign state, without the consent of parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant with the law of nations." Virginia Deb. 391. To this consent, it may be that congress would be a necessary party.

The nature of the jurisdiction in regard to the States having been considered, the inquiry can now be made, can the United States be a party to a suit between two or more States? The constitution does not mention such a case. There were before the federal convention propositions to extend the judicial powers to questions "which involve the national peace and harmony;" "to controversies between the United States and an individual State;" and in the modified form, "to examine into and decide upon the claims of the United States and an individual State to territory." None were incorporated into the constitution, and the last was peremptorily rejected. The jurisdiction of this court over cases to which the United States and the States are respectively parties, is materially different — the one original, the other appellate only. There was no encouragement, nor serious countenance, to the proposition to vest this court with jurisdiction of such cases. This court is organized and its members appointed by one of the parties. Their influence extends with the jurisdiction of this court, their means of reputation with its powers, their habitual connection with the federal legislation naturally inspires a sentiment in favor of the federal authority. These operative causes of bias were known; and apprehensive as the States were of consolidation and the overbearing influence of the central government, we can well understand why only the modified proposal as to jurisdiction was pressed to a vote. I repeat, that the enumeration of the parties in this article of the constitution did not enlarge the liabilities of the States to suits, but it only provided tribunals where suits might be brought, to which they were already subject, or might desire to commence. Nor does the clause, authorizing suits between two or more States, afford any contradiction to this conclusion.

The articles of confederation, by which they were then combined, allowed congress, as the occasion might arise, to appoint special tribunals "to which all disputes and differences now subsisting, or that might hereafter arise, between two or more States, concerning boundary, jurisdiction, or any other cause whatever," should be submitted.

Similar provisions for special and occasional tribunals, in matters of jurisdiction and boundary, formed a part of the plan of the constitution till near the close of the convention when they * were stricken out and the general jurisdiction over those [* 522] as well as other controversies delegated to this court. My conclusion, after an examination of the clause, is, that it is only in controversies between the States that one of their number can be impleaded in this court without its explicit consent; and that this jurisdiction is special, as to the controversy and the parties, embracing none except those between the States of the Union; that the court has no original jurisdiction of the United States, and none of a controversy between them and an individual State; and consequently, that they have no title to appear as a party to the record, nor in any undefined and uncertain relation to it.

And now the question arises, whether the United States can or ought to be concluded as to their property, without a privilege to appear and be heard, by a judgment of the court, upon a question of boundary submitted by two or more of the States, for its adjudication?

Without assigning any effect to the judgment that may be rendered, or anticipating whether the rights of the United States may be reserved, I will assume that the United States will be estopped by the judgment, and that no reservation of their proprietary rights can be made; and consider whether, under such circumstances, there is injustice. The government of Florida involve in this suit her highest claims — those of sovereignty and jurisdiction — and fulfil their chief political obligations in its prosecution. If individual claims are affected by the decree in such a suit, it is because they are so incorporated in the rights of their sovereign as to have no separate or independent existence. She is the representative of all the proprietary rights and interests of her people in their contest with another sovereign. The United States, in resigning their sovereignty over the territory of Florida to the people, and by recognizing their government, relinquished their authority over this controversy, and consented that their proprietary claims to the waste and unappropriated lands should abide the issue to which the State, in her wisdom and fidelity, should attain. This sovereign control of Florida was modified upon her accession to the Union. After this, if the controversy was settled by negotiation and compact, the consent of congress was necessary to its binding operation, as in other cases of compact. If it was settled contradictorily, then this tribunal was appointed to make the determination.

Nor do I perceive that the executive department has any title to disturb the parties or the court, with the expression of anxieties or

apprehensions that this court will be lured to perform what congress alone may do, or that these constitutional conditions will [* 523] * not be honorably fulfilled. The existence of this federal government, in its whole extent, is a testimonial to the magnanimous and disinterested polity of the States of the Union ; nor is the concession, which submits to a tribunal of justice the peaceful and rational adjustment of the controversies between sovereign States, the least weighty of the proofs of those dispositions. It seems to me, that it is the duty of this court to come to the exercise of the jurisdiction the States have conferred, in the same spirit ; to exercise it according to the letter of their submission ; to exclude from its suspicion, jealousies, interventions from any authority, but to meet the parties to the controversy with confidence.

Dissenting from every part of the order, I have filed the reasons for the dissent.

Order. Ordered, that the attorney-general have leave to adduce evidence, either written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States.

After the motion of the Attorney-General for leave to intervene in this suit had been decided, Mr. *Westcott* and Mr. *Johnson*, on behalf of the State of Florida, moved for leave to take out commissions to examine witnesses in the case, and for sundry orders to expedite the case and prepare it for trial.

Among the orders moved for was the following : —

“ That (the consent of the State of Florida being hereby given thereto) the attorney-general of the United States may, in behalf of the United States, use the name of said complainant whenever he may deem it advisable that the United States should sue out any commission, to take any testimony or procure any proofs in said cause ; he giving notice thereof to the solicitors or counsel for said parties, as aforesaid.”

This part of the motion was opposed by the counsel for the State of Georgia ; and in behalf of that State, a motion was made to appoint a commissioner and surveyor to survey the premises in dispute, and take testimony and report to the court ; the motion stating particularly how the duty was to be performed. This motion was opposed by the counsel for the State of Florida.

Westcott, for the complainant.

Badger, contra.

TANEY, C. J., delivered the opinion of the court.

The court have considered the above motions.

* The motion to authorize the attorney-general of the [* 524] United States to take testimony, and to conduct the proceedings on behalf of Florida, with the assent of the State, is refused. Each State must conduct its proceedings for itself. Whatever the attorney-general does in the case, must be for the United States, and in the name of the United States, and with reference to their interest or duty in this controversy.

The motion on behalf of the State of Georgia, to appoint one or more persons to make the necessary surveys and to report their opinion to the court, is also overruled. Each party is at liberty to cause surveys to be made, and maps prepared and filed, by such person as the State may select, or if they can agree, they may jointly appoint one. And these surveys and maps, and the proofs applicable to them, will be examined and considered by the court at the hearing, with the other testimony. But the court do not deem it advisable to appoint one or more persons to make these surveys and examinations, as officers of the court; and think the case will be better brought before them by leaving each State to act for itself.

The court, therefore, overrule the motions; and, for the purpose of preparing the case for hearing, make the following order:—

Final Order. On consideration of the several motions filed yesterday by the complainant's counsel, and of the arguments of counsel thereupon had, as well in support of as against the same, it is ordered by the court that the said motions be and they are hereby overruled. And it is further now here ordered by the court, that the said parties in said cause be allowed until the first Monday of December, 1855, to obtain, take, and file the testimony and proofs, by said parties respectively to be adduced and given in evidence, on the hearing of said cause; and that, to enable said parties respectively so to do, commissions, in the usual form, be issued by the clerk, to examine witnesses, upon application of either party, accompanied by interrogatories, a copy whereof has been served upon the adverse party, or its solicitor or counsel, twenty days previous to such application, in order that cross-interrogatories may be filed within said twenty days by such adverse party; and that the commissioner or commissioners in each instance, if not agreed upon by the counsel of the respective parties, be named by the chief justice or one of the associate justices of this court; and that, forthwith, on the return of any commission executed, the clerk do open and file the same, and cause the same to be printed for the use of said parties.

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[* 525] * And also, that any exceptions to testimony may be taken at the final hearing; and if exceptions be then taken to the competency of testimony, which the opposite party can remove by further proof, the court will reserve the decision, and give time to the party to produce it.

And also that said cause be set for final hearing on the bill, answer, replication, exhibits, testimony, and proofs, so adduced, filed, and admitted, on the second Monday of January, 1856, unless cause be then shown to the court for the continuance thereof.

6 Wal. 50.

THE UNITED STATES, Appellants, v. ARCHIBALD A. RITCHIE.¹

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The 12th section of the act of August 31, 1852, (10 Stats. at Large, 99,) dispenses with the requirements of the 9th section of the act of March 3, 1851, (9 Stats. at Large, 632,) respecting the mode of proceeding in the district court of California, when either party is dissatisfied with the award of the commissioners concerning titles to land in that State. And the provisions of the law of 1852, concerning pleadings and notice, are not so defective as to be invalid.

Though the act of 1851 terms the proceeding in the district court an appeal, and, inasmuch as the commissioners cannot exercise any part of the judicial power under the constitution, there can be no appeal, strictly speaking, from their decision; yet, the proceeding in the district court may be and is considered by this court to be an original proceeding there, with a right of appeal to this court.

By the laws of Mexico, an Indian was capable of receiving a grant of land, and holding it, with the same rights as a white person.

Under the laws of Mexico, the public authorities of California had power to make grants of mission lands.

THE case is stated in the opinion of the court.

Cushing, (attorney-general,) for the United States.

Bibb, contra.

[* 531] * NELSON, J., delivered the opinion of the court.

This is an appeal from a decree of the district court for the northern district of California.

The proceedings were originally commenced before the board of commissioners to settle private land claims in California, under the act of congress of March 3, 1851. 9 Stats. at Large, 631.

A petition was filed before that board by Ritchie against the United States, setting forth a claim to a tract of land known by the name of "Suisun," situate in the jurisdiction of Sonoma, county of Solano, comprising four square Mexican leagues, (nearly 18,000

¹ Mr. Justice DANIEL did not sit in this cause.

acres,) praying that the title might be confirmed. The title claimed is derived from a grant by Juan B. Alvarado, governor of California, to Francisco Solano, dated January 28, 1842.

The commissioners, after hearing the proofs in the case, on the 3d of January, 1853, ordered that the title be confirmed to the claimant.

On the 19th of May, 1853, a transcript of the proceedings before the board, with their decision, was filed with the clerk of the United States district court for the northern district of California; and on the 20th of September, 1853, notice of an appeal from the decision to the district court was filed with the clerk by the attorney-general of the United States.

Further testimony was taken in the case, and heard before the court; and at a special term, held at the city of San Francisco on the 8th of November, 1853, the decision of the board of commissioners was confirmed.

The case is now before us on an appeal from the decree of the district court.

Objections have been taken on the part of the appellee to the jurisdiction of the district court, to hear and determine the case; and also to the regularity of the appeal from the board of commissioners — assuming the court had jurisdiction — which it will be necessary first to notice.

By the 8th section of the act already referred to, it was made *the duty of the commissioners, within thirty days [* 532] after their decision, to certify the same, with the reasons on which it was founded, to the district attorney of the United States of the district in which the decision was rendered. And by the 9th section, it is provided that, in all cases of rejection or confirmation of any claim by the board, it should be lawful for the claimant or district attorney, on behalf of the United States, to present a petition to the district court praying for a review of the decision; and that the petition, if presented by the claimant, should set forth the nature of the claim, &c., together with a transcript of the report of the board, and of the documentary and other evidence on which it was founded. And the petition, if presented by the district attorney, shall be accompanied by a transcript of the board, &c., and shall set forth the grounds upon which the claim is alleged to be invalid; and a copy of the petition shall be served upon the opposite party; and the party upon whom the service shall be made, shall be bound to answer the same within the time prescribed by the judge of the district court, &c. And by the 10th section, it is made the duty of the district court to proceed and render judgment upon the pleadings and evidence in the cause, and upon such further evidence as may be taken by order

of the said court; and, on the application of the party against whom the judgment is rendered, to grant an appeal to the supreme court of the United States. And, by the 12th section, to entitle either party to a review of the board of commissioners, notice of the intention to file a petition in the district court shall be entered on the journal of the board within sixty days after the decision of the claim has been notified to the parties; and the petition shall be filed in the district court within six months after the decision has been rendered.

The mode above prescribed for removing the case from the board of commissioners to the district court, was subsequently changed by the 12th section of the act of congress passed 31st August, 1852, 10 Stats. at Large, 99.

This section provides that in every case in which the board of commissioners shall render a final decision, it shall be their duty to have two certified transcripts of their proceedings and decision, and of the papers and evidence on which the same were founded, made out, one of which transcripts shall be filed with the clerk of the proper district court, and the other transmitted to the attorney-general of the United States; and the filing of such transcript with the clerk shall, *ipso facto*, operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk of

the court within six months thereafter, of his intention to [* 533] prosecute the * appeal, and if the decision shall be against the United States, it shall be the duty of the attorney general, within six months after receiving the said transcript, to cause notice to be filed with the clerk aforesaid, that the appeal will be prosecuted by the United States. And on the failure of either party to file such notice with the clerk, the appeal shall be regarded as dismissed.

The removal of the proceedings before the board of commissioners, in this case, to the district court, took place in conformity with the provisions of the act of 1852, and, it is urged by the counsel for the appellee, that it is defective for not complying with the requirement of the 9th section of the act of 1851, in respect to the petition to the district court therein provided for. But we are of opinion that the 12th section of the act 1852 virtually repeals this section, and thereby dispenses with the petition and answer, as preliminary steps to the hearing in the district court. They clearly are not essential to the removal of the cause, or perfecting of what is called the appeal, as the 12th section of the act 1852 makes the filing of the transcript returned by the commissioners operate, *ipso facto*, as an appeal in favor of the party against whom the decision had been rendered.

The filing of the petition and answer in the district court, prescribed by the 9th section, presenting, in the form of pleadings, the issue to be tried, would have been more in conformity with the practice of courts; but, looking to the nature and character of the questions to be heard and determined in these proceedings before the court, the pleadings cannot be of any very great importance, especially as these questions have already been the subject of examination by both parties before the board of commissioners. The question of practice in the particular case is rather a matter of form than of substance.

It is objected, further, that the 12th section of the act of 1852 makes no provision for notice to the party in whose favor the decision has been rendered by the commissioners, of the appeal to the district court, and that a hearing may be had there, and the decision reversed in his absence. But he has notice of the appeal, as the filing of the transcript by the board, according to the act, has that effect; and then ordinary diligence will enable the party to be heard on the appeal. Besides, the court has the power, doubtless, to regulate the time of the hearing, and provide for reasonable notice by its rules, so as to prevent surprise.

It is also objected, that the law, prescribing an appeal to the district court from the decision of the board of commissioners, is unconstitutional; as this board, as organized, is not a court under the constitution, and cannot, therefore, be invested with any of the judicial powers conferred upon the general government.

* *American Ins. Co. v. Canter*, 1 Pet. 511; *Benner v. Porter*, [* 534] 9 How. 235; *United States v. Ferreira*, 13 *ibid.* 40.

But the answer to the objection is, that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere reëxamination of the case as heard and decided by the board of commissioners, but hears the case *de novo*, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce.

In this respect, the proceeding is somewhat analogous to that before the district court, under the act of congress, 26th May, 1824, §§ 1, 3, (4 Stats. at Large, 52, 53,) concerning French and Spanish grants in the State of Missouri, which had been previously heard be-

fore a board of commissioners for confirmation. In these cases, the evidence before the board was received on the hearing in the district court.

This brings us to the merits of the case.

It appears, from the evidence in the case, that Francisco Solano, from whom the appellee derives title, was in the possession and cultivation of the land in question as early as 1832 or 1833; and that, on the 16th January, 1837, he applied for a provisional grant of the same, from M. G. Vallejo, the military commander of the northern frontier of Upper California, and director of colonization. The proceedings are as follows:—

“To the Commandant-General:—

“Francisco Solano, principal chief of the unconverted Indians, and born captain of the ‘Suisun,’ in due form, before your honor, represents: That, being a free man, and owning a sufficient number of cattle and horses to establish a rancho, he solicits from the strict justice and goodness of your honor that you be pleased to grant him the land of the ‘Suisun,’ together with its known appurtenances, which are a little more or less than four square leagues, from the ‘Portzuela to the Salina de Sucha.’ Said land belongs to him, by hereditary right from his ancestors, and he is actually in possession of it; but he wishes to revalidate his rights in accordance with the existing laws of our republic, and of the colonization recently decreed by the supreme government.

“He therefore prays that your honor be pleased to grant [*535] him *the land which he asks for, and to procure for him, from the proper sources, the titles which may be necessary for his security, and that you will also admit this on common paper, there being none of the corresponding stamp in this place.

“(Signed,)

FRANCISCO SOLANO.

“*Sonoma, January 16, 1837.*”

“*Sonoma, January 18, 1837.*”

“The undersigned grants, temporarily and provisionally, to Francisco Solano, chief of the tribes of this frontier and captain of the ‘Suisun,’ the lands of that name, as belonging to him by natural right and actual possession. Said land is comprehended between the ‘Portzuela and the Salina de Sucha.’ The party interested will ask from the governmental of the State the usual titles, in order to make valid his rights in conformity with the new order of colonization.

“(Signed)

M. G. VALLEJO.”

He continued in the possession and occupation down to 1842,

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when an application was made by his attorney, Vallejo, to Juan B. Alvarado, constitutional governor of the department of California, for a title in form to the tract, as follows:—

“ [SEAL.] To his Excellency the Governor:—

“ The undersigned, a resident of Sonoma, respectfully appears before your excellency, and representation makes, that, in virtue of the rights which belong to him, as shown in the annexed petition and marginal decree, he is in actual possession of the land known by the name of ‘ Suisun,’ together with its dependencies; and, in order to secure and legalize said ownership, he humbly petitions that your excellency, in consideration of the document referred to, may be pleased to grant him the corresponding title of concession, perpetual and hereditary, of the aforesaid land, in order that, in no time, may the petitioner or his heirs be molested in the pacific enjoyment of his property.

“ Wherefore, your petitioner prays that your excellency will deign to grant him the favor which he asks for, he swearing that he is actuated by no malice, and such other oath as is required, &c., &c.

“ As attorney of the petitioner,

“ (Signed)

JUAN ANTONIO VALLEJO.

“ Monterey, January 15, 1842.”

“ Monterey, January 28, 1842.

“ In consideration of the petition of the beginning of this *expediente*, the report of the commandant-general, and the merits and services of the Indian called Francisco Solano, *rendered [* 536] on the frontier of Sonoma, I declare him to be owner in fee of the place called ‘ Suisun,’ in extent four square leagues, and with the boundaries shown in the corresponding map. The corresponding patent will be made out, and this *expediente* directed to the most excellent departmental junta for its approbation.

“ Juan B. Alvarado, constitutional governor of the department of the Californias, thus ordered, decreed, and signed. Of which I certify.”

And, on the 21st January, 1842, the title in form was granted, as follows:—

“ [SEAL.] Juan B. Alvarado, constitutional governor of the department of the Californias.

“ Whereas the aboriginal Francisco Solano, for his own personal benefit and that of his family, has asked for the land known by the

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name of 'Suisun,' of which place he is native, and chief of the tribes of the frontiers of Sonoma, and being worthy of reward for the quietness which he caused to be maintained by that unchristianized people; the proper proceedings and examinations having previously been made, as required by the laws and regulations; using the powers conferred on me in the name of the Mexican nation, I have granted to him the above-mentioned land, adjudicating to him the ownership of it. By these presents, being subject to the approbation of the most excellent departmental junta, and to the following conditions, to wit:—

"1. That he may inclose it, without prejudice to the crossings, roads, and servitudes, and enjoy it freely and exclusively, making such use and cultivation of it as he may see fit; but within one year he shall build a house, and it shall be inhabited.

"2. He shall ask the magistrate of the place to give him juridical possession of it, in virtue of this order, by whom the boundaries shall be marked out; and he shall place in them, besides the landmarks, some fruit or forest trees of some utility.

"3. The land herein mentioned is to the extent of four 'sitios de ganado mayor,' (four square leagues,) with the limits as shown on the map accompanying the respective *expediente*. The magistrate who gives the possession, will have it measured according to ordinance, leaving the excess that may result to the nation, for its convenient uses.

"4. If he shall contravene these conditions, he shall lose his right to the land, and it may be denounced by another.

"In consequence, I order that these presents be held firm and valid, that a register be taken of it in the proper book, and [* 537] that * it be given to the party interested, for his voucher and other purposes.

"Given this twenty-first day of January, one thousand eight hundred and forty-two, at Monterey.

"(Signed)

JUAN B. ALVARADO.

"(Signed)

MANUEL JIMENO; *Secretary*."

On the 3d of October, 1845, the grant was approved by the departmental assembly, as follows:—

"Most Excellent Sir:—

"The committee on vacant lands has ordered the *expediente*, formed at the instance of the Indian, (Indigena,) Francisco Solano, for the place known by the name of 'Suisun,' and being satisfied that the proceedings had in the said *expediente* were sufficient for the pur-

pose, that the superior government should have granted the said place, offers to the deliberation of your excellency the following proposition :—

“ The grant made by the superior government of the department by a title legally issued, with the date 28th January, 1842, in favor of the Indian, (Indigena,) Francisco Solano, of the place known by the name of ‘ Suisun,’ and situated in the jurisdiction of Sonoma, in accordance with the law of August 18, 1824, and article 5 of the regulations of November, 1828, is approved.

“ Hall of the committee, in the city of Los Angeles, September 29, 1845.

“ (Signed)

FRANCISCO DE LA GUERRA.

“ (Signed)

MARCESO BARTELA.”

“ Angeles, October 3, 1845.

“ In session of this day, the proposition of the foregoing report was approved by the most excellent departmental assembly, ordering the original *expediente* to be returned to his excellency the governor, for suitable purposes.

“ (Signed)

Pio Pico, *President*.

“ (Signed)

AUGUSTIN OLONA, *Secretary*.

“ On the same day, the proper copy was issued to the party interested.”

The tract was duly surveyed, the boundaries fixed, and the grantee put in judicial possession, in conformity with the conditions of the grant, and which possession corresponded with the provisional possession previously ceded to him in 1837.

On the 10th May, 1842, Solano sold and conveyed the premises to Mariano Guadaloupe Vallejo, in full property, for the consideration of one thousand Mexican dollars; and, on the 29th May, 1850, Vallejo sold and conveyed the same to A. A. Ritchie, the appellee, for the consideration of fifty thousand dollars.

* No question is made as to the genuineness and good [* 538] faith of the original grant to the Indian, Solano, nor but that it was made by the competent authority of the government to dispose of the public lands.

The only objections taken to its validity, and upon which it is denied that it had the effect and operation to separate the lands granted from the public domain, are: 1. That Solano, being an Indian, was not competent, according to the laws of Mexico concerning the disposition of the public lands at the time of the grant, to take and hold real property; and hence, that the grant by the

governor, and approved by the departmental assembly, was inoperative and void; and, 2. That, if it should be held that Solano was competent to take and hold real property, still, the grant is void, on the ground that the tract known by the name of "Suisun" belonged to the mission lands in California, which the public authorities of that department had no power to grant.

1. In answer to the first objection, we are referred to the plan of Iguala, adopted by the revolutionary government of Mexico, 24th February, 1821, a short time previous to the subversion of the Spanish power in that country, in which it is declared, that "all the inhabitants of New Spain, without distinction, whether Europeans, Africans, or Indians, are citizens of this monarchy, with a right to be employed in any post according to their merit and virtues;" and that "the person and property of every citizen will be respected and protected by the government." We are also referred to the treaty of Cordova, 24th August, 1821, between the Spanish viceroy and the revolutionary party, by which the independence of the country was for the time established; and to the declaration of independence issued 28th September, 1821, all reaffirming the principles of the plan of Iguala.

Two decrees of the first Mexican congress are also referred to; one adopted 24th February, 1822, and the other 9th April, 1823.

The first: "The sovereign congress declares the equality of civil rights to all the free inhabitants of the empire, whatever may be their origin in the four quarters of the earth." The other reaffirms the three guarantees of the plan of Iguala: 1. Independence. 2. The Catholic religion; and 3. Union of all Mexicans of whatever race.

There is, also, another act of the Mexican congress of the 17th September, 1822, carrying into practical effect this fundamental principle of the new government, as follows: "The sovereign Mexican constituent congress, with a view to give due effect to the [* 539] 12th article of the plan of Iguala, as being one * of those which form the social basis of the edifice of our independence, has determined to decree and does decree.

"Art. 1. That in every register and public or private document, on entering the name of citizens of this empire, classification of them with regard to their origin shall be omitted.

"Art. 2. That although by virtue of the preceding article, there shall be no distinction of class on the parochial books, that which is at present observed will be continued in the regulations for the graduation of the civil and ecclesiastical taxes, until these shall be arranged in some other method more just and proper."

In consistency with this fundamental principle of the Mexican

government, as declared in the several acts above referred to, namely, the citizenship of all the inhabitants, without distinction of blood or race, is the 9th article of the decree of 18th August, 1824, on colonization, which provides, that "in the distribution of the lands, Mexican citizens are to be preferred, and between them no distinction shall be made, except such only as is due to special merit and services rendered to the country, or in equality of circumstances, residence in the place to which the lands to be distributed are pertinent; and the 16th article provides, that "the government, conformably to the principles established in this law, shall proceed to the colonization of the territories of the republic."

Upper California, in which the lands in question are situate, was one of those territories. And the first regulation made for colonizing the territories, which was 21st November, 1828, provided "that the governors of the territories are authorized, in compliance with the laws of the general congress of 18th August, 1824, and under the conditions hereafter specified, to grant the vacant lands in their respective territories to such contractors, (*empresarios*,) families or single persons, whether Mexicans or foreigners, who may ask for them for the purpose of cultivating or inhabiting them."

The Indian race having participated largely in the struggle resulting in the overthrow of the Spanish power, and in the erection of an independent government, it was natural that in laying the foundations of the new government, the previous political and social distinctions in favor of the European or Spanish blood should be abolished, and equality of rights and privileges established. Hence the article to this effect in the plan of Iguala, and the decree of the first congress declaring the equality of civil rights, whatever may be their race or country. These solemn declarations of the political power of the government had the effect, necessarily, to invest the Indians with the privileges of citizenship as effectually as had the declaration *of independence of the United States, of 1776, to [* 540] invest all those persons with these privileges residing in the country at the time, and who adhered to the interests of the colonies. 3 Pet. 99, 121.

The improvement of the Indians, under the influence of the missionary establishments in New Spain, which had been specially encouraged and protected by the mother country, had, doubtless, qualified them in a measure for the enjoyment of the benefits of the new institutions. In some parts of the country very considerable advancement had been made in civilizing and christianizing the race. From their degraded condition, however, and ignorance generally, the privileges extended to them in the administration of the government

must have been limited; and they still, doubtless, required its fostering care and protection.

But as a race, we think it impossible to deny, that, under the constitution and laws of the country, no distinction was made as to the rights of citizenship, and the privileges belonging to it, between this and the European or Spanish blood. Equality between them, as we have seen, has been repeatedly affirmed in the most solemn acts of the government.

Solano, the grantee in this case, was a civilized Indian, was a principal chief of his race on the frontiers of California, held a captain's commission in the Mexican army, and is spoken of by the witnesses as a brave and meritorious officer.

Our conclusion is, that he was one of the citizens of the Mexican government at the time of the grant to him, and that, as such, he was competent to take, hold, and convey real property, the same as any other citizen of the republic.

2. As to the objection that the tract in question belonged to the mission lands, which the public authorities in California had no power to grant, there appears to be no foundation for this objection.

As early as 17th August, 1833, the Mexican congress decreed that "the government will proceed to secularize the missions of Upper and Lower California;" and various regulations are prescribed for carrying this policy into effect.

Again, 26th November, the same year, it is declared that "the government is empowered to adopt all measures which shall secure the colonization and render effective the secularization of the missions in Upper and Lower California, being authorized to use in the most convenient manner the property devoted to pious uses, in the said territories, for that purpose."

Again, by a decree of 14th April, 1834, it is declared that "all the missions of the republic will be secularized."

Under these laws, the authorities empowered to grant the [* 541] * public lands, have dealt with these mission establishments the same as with any other portions of the public domain; the clergy, who previously had the charge and control of them, being confined simply to the ecclesiastical and spiritual direction and government of the missions.

We could refer, had we time, to a body of authority on this part of the case, in addition to that above mentioned; but we deem it unnecessary, and shall close by affirming the decree of the district court.

It is conceded that the lands in question do not belong to the class called Pueblo lands, in respect to which we do not intend to express

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any opinion, either as to the power of the authorities to grant or the Indians to convey.

CAMPBELL, J. I concur in the judgment of the court upon the facts disclosed in the record.

I am unable to find evidence to show that the lands in dispute were attached to the mission of San Francisco Solano, for the single sentence in the deposition of Vallejo, "that in 1835, according to the rules of secularization, the grantee had acquired the rights of possession," is too vague, and include too little of a reference to facts to rest any argument that the grant to Solano was of mission lands, contrary to the laws of Mexico. I therefore am not willing to pass any judgment upon the subject of the mission lands of California. Nor do I consider that the sufficiency of the conveyance from Solano to Vallejo, a question before us. The conveyance of Solano was recognized before a public officer, and has been followed by possession. For the purposes of this case this is sufficient. This was decided in *Percheman's case*, 7 Pet. 51-98. The court say there, that the questions upon the validity of mesne conveyances have no interest to the United States, and they cannot be investigated or decided.

17 H. 542; 18 H. 589, 553; 6 Wal. 363.

JOHN CHARLES FREMONT, Appellant, v. THE UNITED STATES.

17 H. 542. (1)

The principles of the decisions of this court concerning titles in Louisiana and Florida, examined, and distinctions between those titles and titles in California, stated.

A grant by the Mexican governor of California, of ten square leagues of land within a certain district of country, in consideration of meritorious services of the grantee, conferred an equitable right to that quantity of land within that district, valid as against the Mexican government and consequently as against the United States, though the particular tract had not been designated by a survey, at the time of the cession to the United States; and the particular land to which this title is to attach must be ascertained by a survey made under the authority and in the mode provided by the laws of the United States.

The force and effect of the conditions subsequent, annexed to this grant, considered.

APPEAL from the District Court of the United States for the Northern District of California. The case is stated in the opinion of the court, but it may be useful to append the title papers on which the appellant relied to show the title acquired from the Mexican Government.

W. Cary Jones, Bibb and Crittenden, for the appellant.

Cushing, (attorney-general,) *contra*.

(1) Mr. Justice DANIEL did not sit in this cause.

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[* 543] “Record of proceedings instituted by citizen Juan Bautista Alvarado, colonel of the auxiliary militia, soliciting the tract of land called ‘Las Mariposas.’

“Anno 1844. (Number 352.)

“To his Excellency the Governor: —

“I, Juan B. Alvarado, colonel of the auxiliary militia of this department, to your excellency, with due respect, do represent, that being actually the owner (by purchase which I made) of a very small tract of land, which is not sufficient to support the cattle with which it is stocked, without injury to the estates likewise there established, and being desirous of increasing it, at the same time to contribute to the spreading of the agriculture and industry of the country, I solicit your excellency, according to the colonization laws, to be pleased to grant me ten sitios de ganado mayor (ten square leagues)

of land, north of the River San Joaquin, within the limits [* 544] of the Snow Mountain, (Sierra * Nevada,) in the same direction the River Chanchilles, in the east part of the Merced, on the west, and the before-mentioned San Joaquin, with the name of the Mariposas, offering to present to Y. E. the proper plan and draft thereof so soon as the same shall be made with exactness, not doing it at this time for the difficulty of being a wilderness country on the confines of the wild Indians, and because I desire that my claim for this cause may not be delayed.

“Therefore, I hope from the good intentions of Y. E., in favor of the improvements of the country, the most favorable result, if it be in justice, by which I will receive favor.

“(Signed)

JUAN B. ALVARADO.

“Rancho del Alizal, 23d of February, 1844.”

“Monterey, 27th of February, 1844.

“Let the secretary of state report, and he may require such other reports as he may deem expedient, should he need them.

“(Signed)

MICHEL TORRENA.”

“As directed by his Excellency, the governor, let the preceding petitioner be referred to the first alcalde of San José, that he may be pleased to report thereon. “(Signed)

MANUEL JIMENO

“Monterey, 26th of February, 1844.”

“To the Secretary of State: —

“The land solicited in this petition by Don Juan B. Alvarado is entirely vacant; it does not belong to any individual, town, or corporation, and I believe that for these reasons, as well as that of the petitioner being meritorious for his patriotic services and commendable circumstances, there is no impediment for granting him the said

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land in fee. This is all I have to report to your Honor in answer to your preceding superior order, which opinion I submit to the decision of your Honor, which will be the most proper one.

“ (Signed) ANTONIO M^A PICO.”

“Town of San José, Gaudaloupe, February 29, 1844.”

“ To his Excellency the Governor : —

“ According to the report of the magistrate of San José, and the information I have acquired from persons who know the land, it is ascertained the same may be granted to the petitioner, who may be favorably considered for the services which he has rendered to the department. The superior judgment of Y. E. will decide the expediency.

(Signed) MANUEL JIMENO.

“ Monterey, 29th of February, 1844.”

“ Monterey, 22d of February, 1844.

* Let the title be issued, expressing that he (the petitioner) [* 545] is meritorious for his patriotic services, and consequently worthy of preference.

(Signed) MICHEL TORRENA.”

“ Monterey, 29th of February, 1844.

“ Having considered the petition which is at the beginning of this record of proceedings, (*espediente*), the preceding report, and the patriotic services of the petitioner, with every thing worthy of consideration in the premises, in conformity with the laws and regulations upon the subject, I declare Don Juan Bautista Alvarado owner in fee of the tract of land known by the name of “ Las Mariposas,” within the boundaries of the Snow Mountains, (Sierra Nevada,) and the rivers called the Chanchilles, the Merced, and San Joaquin.

“ Let the proper patent be issued, let it be registered in the respective book, and let this record of proceedings be transmitted to the most excellent departmental assembly, for its approval.

MANUEL MICHEL TORRENA,

“ *Brigadier-General of the Mexican Army, Adjutant-General of the Staff of the same, Governor and Commandant-General of the Department of the Californias.*”

“ Whereas, Don Juan B. Alvarado, colonel of the auxiliary militia of this department, is worthy, for his patriotic services, to be preferred in his pretension, for his personal benefit and that of his family, for the tract of land known by the name of the Mariposas, to the extent of ten square leagues (*sitios de ganado mayor*) within the limits of the Snow Mountain, (Sierra Nevada,) and the rivers known by the names of the Chanchilles, of the Merced, and the San Joaquin, the necessary requirements, according to the provisions of the laws and regulations, having been previously complied with, by virtue of the authority in me vested, in the name of the Mexican nation, I have

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granted to him the aforesaid tract, declaring the same by these presents his property in fee, subject to the approbation of the most excellent the departmental assembly, and to the following conditions:—

“ 1. He shall not sell, alienate, or mortgage the same, nor subject it to taxes, entail, or any other encumbrance.

“ 2. He may inclose it without obstructing the crossings, the roads, or the right of way; he shall enjoy the same freely and without hindrance, destining it to such use or cultivation as may most suit him; but he shall build a house within a year, and it shall be inhabited.

“ 3. He shall solicit, from the proper magistrate, the judicial possession of the same, by virtue of this patent, by whom the boundaries shall be marked out, on the limits of which he (the grantee) shall place the proper landmarks.

[* 546] “ 4. The tract of land granted is ten sitios de ganado mayor, (ten square leagues,) as before mentioned. The magistrate who may give the possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper uses.

“ 5. Should he violate these conditions, he will lose his right to the land, and it will be subject to being denounced by another.

“ Therefore, I command that these presents being held firm and binding, that the same be registered in the proper book, and delivered to the party interested, for his security and other purposes.

“ Given in Monterey, this 29th day of the month of February, in the year of 1844.

MANL. MICHELTORRENA.

“ MANUEL JIMENO, Secretary.”

“ This patent is registered in the proper book on the reverse of folio ‘ 6.’

JIMENO.”

[* 552] * TANEY, J., delivered the opinion of the court.

The court have considered this case with much attention. It is not only important to the claimant and the public, but it is understood that many claims to land in California depend upon the same principles, and will, in effect, be decided by the judgment of the court in this case.

A preliminary question has been raised, as to the jurisdiction of the district court from which the appeal has been taken; but the same question has been already examined and decided in the case of *The United States v. Ritchie*, and it is unnecessary to discuss it further. We think it very clear that the district court had jurisdiction, and proceed to examine the validity of the claim upon this appeal.

The 8th section of the act of March 3, 1851,¹ "to ascertain *and settle the private land claims in the State of Cali- [* 553] fornia," directs: "That each and every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the commissioners, (to be appointed under that act,) when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

And the 11th section provides, that the commissioners therein provided for, and the district and supreme court, in deciding on any claim brought before them under the provisions of that act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the supreme court of the United States, as far as they are applicable.

The decisions of the supreme court, mentioned in this section, evidently refer to decisions heretofore given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authorities, previous to the cession to the United States. And as these decisions must govern the case under consideration, as far as they are applicable, it is proper to state the principles upon which they were made, before we proceed to examine it. In doing this, however, we do not propose to refer separately to each of the numerous decisions which may be found in the reports; nor is it necessary. They will be found to have been uniformly decided upon certain fixed principles of law, applicable to those grants, which cannot always be applied with justice and equity to a case like the one before us. The laws of congress, giving the jurisdiction, were different in one respect; and the condition of the countries, as well as the laws and usages of the nation making the grants, were also different.

It will be seen, from the quotation we have made, that the 8th section embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination, and to be passed upon by the court. The object of this provision appears to be, to

¹ 9 Stats. at Large, 632.

place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy.

[* 554] In this respect, it differs from the act of 1824,¹ under which the claims in Louisiana and Florida were decided. The jurisdiction of the court, in these cases, was confined to inchoate equitable titles, which required some other act of the government to vest in the party the legal title or full ownership. If he claimed to have obtained from either of the former governments a full and perfect title, he was left to assert it in the ordinary forms of law, upon the documents under which he claimed. The court had no power to sanction or confirm it when proceeding under the act of 1824, or the subsequent laws² extending its provisions.

And the language of the court, in passing judgment upon the claims in Louisiana or Florida, must always be understood as applying to cases in which the government still held the ownership of the land, and where the right of the party to demand a conveyance upon principles of equity and good faith, must be shown by him, before he could claim it from the United States.

The mode and form of granting lands in these provinces, and the character and stability of the provincial governments, must also be considered, before we can determine how far the principles established in the decisions of those cases are applicable to the grants by the Mexican authorities, after the country was separated from Spain.

Grants of land in Louisiana and Florida were usually made in the following manner: The party who desired to form a settlement upon any unoccupied land presented his petition to the officer who had authority to grant, stating the quantity of land he desired, the place where it was situated, and the purposes to which it was to be applied. Upon the receipt of the petition, the governor, or other officer who had the power to grant, issued what is usually called a concession to the party, authorizing him to have the land surveyed by the official surveyor of the province. And it was the duty of this officer to ascertain whether the land asked for was vacant, or the grant of it would prejudice the rights of other parties; and, if the surveyor found it to be vacant, and that the grant would not interfere with the rights of others, he returned a plat, or figurative plan, as it was called, and the party thereupon received a grant in absolute ownership.

These grants were almost uniformly made upon condition of settlement, or some other improvement, by which the interest of the colony, it was supposed, would be promoted. But until the survey

¹ 4 Stat. at Large, 52.

² Ib. 298; 5 Ib. 676.

was made, no interest, legal or equitable, passed in *the [* 555] land. The original concession granted on his petition was a naked authority or permission, and nothing more. But when he had incurred the expense and trouble of the survey, under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant. But the examination of the surveyor, the actual survey, and the return of the plat, were conditions precedent, and he had no equity against the government and no just claim to a grant until they were performed; for he had paid nothing, and done nothing, which gave him a claim upon the conscience and good faith of the government. There were some cases, indeed, in which there were absolute grants of title with conditions subsequent annexed to them. The case of Arredondo, reported in 6 Pet., and of which we shall speak hereafter, was one of this description. But the great mass of cases which come before this court, and which have been supposed to bear on this case, were of the character above mentioned.

It necessarily happened, from this mode of granting, that many concessions were obtained which the parties never afterwards acted on. A person who had contemplated a settlement, or planting a colony, or making some other improvement in a particular place, sometimes changed his mind, or found some other situation more suitable, or found himself unable to comply with the conditions which, in his petition, he had proposed to perform.

But these concessions or permissions were never recalled, and remained in the possession of the party, although he had abandoned all thoughts of acting upon them. And when the United States obtained the sovereignty of these countries, and the energy, enterprise, and industry of our citizens were rapidly filling it, and lands which were of no value under the Spanish government, would be ample fortunes under the United States, many persons, who for years had held these concessions without attempting to avail themselves of the authority they gave him, came forward and claimed the right to do so under the government of the Union.

A few cases, which appear to have been relied on in the argument in behalf of the United States, will show the character of most of them, and the principles upon which they were decided in this court. In the case of Boisdoré, 11 How. 63, he had obtained the authority or concession on which he relied in the year 1783. He had never caused a survey to be made during the existence of the Spanish government, although twenty years had elapsed before its cession to this country. * Nor was any step taken by him [* 556]

to obtain a title from the United States, nor any claim legally brought forward, for seventeen years after the territory had been ceded to the United States. And nothing like any serious attempt had been made to fulfil the conditions upon which he had obtained the concession.

So, too, in the case of Glenn and others v. The United States, 13 How. 250, (usually called the Clamorgan case,) the grant was obtained in 1796, and no possession taken, and no survey had, nor any of the stipulations into which he had entered complied with, while the Spanish government lasted. Nor, indeed, was any claim made to it for several years after the cession to the United States; nor until the country in which it was situated was filling up with an industrious population, and the land becoming of great value.

So, again in the case of Villemont against the United States, (13 How. 266,) the concession or authority was made in 1795, and there was an express provision in the concession, that unless the establishment he proposed in his petition was made on the land in three years, the concession should be null. Yet he did nothing during the continuance of the Spanish government, although it lasted eight years afterwards; and the excuse from Indian hostility could hardly avail him, because no difficulty of that kind is suggested in his petition; and from the character of the improvements he promised to make, it would seem that one of the objects of this large grant was to form an establishment which would be useful in repelling Indian hostilities from the neighboring Spanish settlements.

This brief statement of the facts in these cases shows that the parties had acquired no right, legal or equitable, to these lands under the Spanish government. The instruments under which they claimed, were evidently not intended as donations of the land, as a matter of favor to the individual, or as a reward for services rendered to the public. They were intended to promote the settlement of the territories, and to advance its prosperity. But up to the time when Spain ceded them, the parties had done nothing to accomplish the object, or to carry out the policy of the government. They had evidently no claim, therefore, upon the justice or conscience of the Spanish government. It had not granted them the land, and they had done nothing which, in equity, bound that government to make them a title. And when Spain ceded the territories to the United States, it held these lands as public domain as fully and amply as if those concessions or authorities had never been given; and the United States received the title in the same full and ample manner; neither the legal nor equitable right to them, as public domain, had [* 557] been impaired * by any act of the Spanish authority, nor had any right been conveyed to or vested in the claimants.

It is proper to remark, that the laws of these territories under which titles were claimed, were never treated by the court as foreign laws to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a State of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of a statute, and the powers exercised under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources, such as the records of official acts, and the practice of the different tribunals and public authorities. And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that it is for the court to decide what weight is to be given to information obtained from any of these sources. It exercises the same discretion and power, in this respect, which it exercises when it refers to the different reported decisions of state courts, and compares them together, in order to make up an opinion as to the unwritten law of the State, or the construction given to one of its statutes.

With these principles, which have been adjudicated by this court, to guide us, we proceed to examine the validity of the grant to Alvarado, which is now in controversy.

There can be no question as to the power of the governor of California to make the grant. And it appears to have been made according to the regular forms and usages of the Mexican law. It has conditions attached to it; but these are conditions subsequent. And the first point to be decided is, whether the grant vested in Alvarado any present and immediate interest; and, if it did, then, secondly, whether any thing done or omitted to be done by him, during the existence of the Mexican government in California, forfeited the interest he had acquired, and revested it in the government? For if, at the time the sovereignty of the country passed to the United States, any interest, legal or equitable, remained vested in Alvarado or his assigns, the United States are bound in good faith to uphold and protect it.

Now, the grant in question is not like the Louisiana and Florida concessions — a mere permission to make a survey in a particular place, and return a plat of the land he desires, with
* a promise from the government that he shall have a [* 558] title to it when these things are done. But the grant, after

reciting that Alvarado was worthy, for his patriotic services, to be preferred in his pretension for his personal benefit, and that of his family, for the tract of land known by the name of Mariposas, to the extent of ten square leagues, within certain limits mentioned in the grant; and that the necessary requirements, according to the provisions of the laws and regulations, had been previously complied with, proceeds, in the name of the Mexican nation, to grant him the aforesaid tract, declaring the same, by that instrument, to be his property in fee, subject to the approbation of the departmental assembly and the conditions annexed to the grant.

The words of the grant are positive and plain. They purport to convey to him a present and immediate interest. And the grant was not made merely to carry out the colonization policy of the government, but in consideration of the previous public and patriotic services of the grantee. This inducement is carefully put forth in the title papers. And, although this cannot be regarded as a money consideration, making the transaction a purchase from the government, yet it is the acknowledgment of a just and equitable claim; and, when the grant was made on that consideration, the title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same conditions.

It is argued that the description is so vague and uncertain that nothing passed by the grant; and that he had no vested interest until the land was surveyed, and the part intended to be granted severed by lines or known boundaries from the public domain. But this objection cannot be maintained. It is true, that if any other person within the limits where the quantity granted to Alvarado was to be located, had afterwards obtained a grant from the government, by specific boundaries, before Alvarado had made his survey, the title of the latter grantee could not be impaired by any subsequent survey of Alvarado. As between the individual claimants from the government, the title of a party who had obtained a grant for the specific land would be a superior and a better one. For, by the general grant to Alvarado, the government did not bind itself to make no other grant within the territory described, until after he had made his survey. But, as between him and the government, he had a vested interest in the quantity of land mentioned in the grant. The right to so much land, to be afterwards laid off by official authority, in the territory described, passed from the government to him by the execution of the instrument granting it.

[* 559] * This principle of law was maintained by the decision of this court, in the case of *Rutherford v. Greene's Heirs*, reported in 2 Wheat. 196. The State of North Carolina, in 1780, passed

an act reserving a certain tract of country to be appropriated to its officers and soldiers; and in 1782, after granting 640 acres in the territory reserved to each family that had previously settled on it, and appointing commissioners to lay off, in one or more tracts, the land allotted to the officers and soldiers, proceeded to enact that 25,000 acres of land should be allotted for and given to Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense the State entertained of the extraordinary services of that brave and gallant officer."

In pursuance of this law, the commissioners allotted 25,000 acres of land to General Greene, and caused the tract to be surveyed and returned to the proper officer. The manner in which the title originated under which Rutherford claimed, is not very clearly stated in the case. The decision turned altogether on the validity of the title of General Greene, and the date at which it commenced. And the court said, that the general gift of 25,000 acres lying in the territory reserved, became, by the survey, a particular gift of the 25,000 acres contained in the survey. And, after examining the title very fully, the court, in conclusion, say: "It is clearly and unanimously the opinion of the court, that the act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the boundaries allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned March 3, 1783, gave precision to that title, and attached it to the land surveyed."

There was a further objection taken to the title of General Greene, upon the ground that, by the constitution of North Carolina, there should be a seal of the State to be kept by the governor and affixed to all grants. And it was objected, that this grant by the legislature had not the formality required by the constitution to pass the estate. But in answer to this, the court said that this provision was intended for the completion and authentication of an instrument attesting a title previously created by law. That it was merely the evidence of prior legal appropriation, and not the act of the original appropriation itself.

The principles decided in this case appear to the court to be conclusive as to the legal effect of the grant to Alvarado. It recognizes as a general principle of justice and municipal law, that such a grant for a certain quantity of land by the government, to be afterwards surveyed and laid off within a certain * territory, vests [* 560] in the grantee a present and immediate interest. In the language of the court, the general gift becomes a particular gift when the survey is made; and when this doctrine has been asserted in this

court, upon the general principles which courts of justice apply to such grants from the public to an individual, good faith requires that the same doctrine should be applied to grants made by the Mexican government, where a controversy arises between the United States and the Mexican grantee.

The fact that the grant to General Greene was made by an act of assembly, did not influence the decision; nor did the court allude to it as affecting the question. It is the grant of the State, whether made by a special law of the legislature, or by the public officer authorized to make it.¹

Another objection has been made, upon the ground that the 8th article of the regulations of 1828 requires what is called a definite grant, signed by the governor, to serve as a title to the party interested, wherein it must be stated that the said grant is made in exact conformity with the provisions of the laws, in virtue whereof possession shall be given; and it is argued that no title passed until this definite grant was obtained. But this document is manifestly intended as the evidence that the conditions annexed to the grant have all been complied with. It is not required in order to give him a vested interest, but to show that the estate, conveyed by the original grant upon certain conditions, is no longer subject to them; and that he has become definitely the owner, without any conditions annexed to the continuance of his estate. It is like the patent required by the laws of North Carolina after the original grant to General Greene, which the court said was for the completion and authentication of an instrument attesting a title previously created by law; and, like the case of General Greene, Alvarado had a vested interest without it.

Regarding the grant to Alvarado, therefore, as having given him a vested interest in the quantity of land therein specified, we proceed to inquire, whether there was any breach of the conditions annexed to it, during the continuance of the Mexican authorities, which forfeited his right and revested the title in the government.

The main objection, on this ground, is the omission to take possession, to have the land surveyed, and to build a house on it, within the time limited in the conditions. It is a sufficient answer to this objection to say, that negligence in respect to these conditions, and others annexed to the grant, does not, of itself, always forfeit his right. It subjects the land to be denounced by another, but [* 561] the conditions do not declare the land *forfeited to the State, upon the failure of the grantee to perform them.

¹ See also *Lessieur et al. v. Price*, 12 How. 59.

The chief object of these grants was to colonize and settle the vacant lands. The grants were usually made for that purpose, without any other consideration, and without any claim of the grantee on the bounty or justice of the government. But the public had no interest in forfeiting them even in these cases, unless some other person desired, and was ready to occupy them, and thus carry out the policy of extending its settlements. They seem to have been intended to stimulate the grantee to prompt action in settling and colonizing the land, by making it open to appropriation by others, in case of his failure to perform them. But as between him and the government, there is nothing in the language of the conditions, taking them all together, nor in their evident object and policy, which would justify the court in declaring the land forfeited to the government, where no other person sought to appropriate them, and their performance had not been unreasonably delayed; nor do we find any thing in the practice and usages of the Mexican tribunals, as far as we can ascertain them, that would lead to a contrary conclusion.

Upon this view of the subject, we proceed to inquire whether there has been any unreasonable delay, or want of effort, on the part of Alvarado to fulfil the conditions? For if this was the case, it might justly be presumed, as in the Louisiana and Florida concessions, that the party had abandoned his claim before the Mexican power ceased to exist, and was now endeavoring to resume it, from the enhanced value under the government of the United States.

The petition of Alvarado to the governor is dated February 23, 1844; and, after passing through the regular official forms required by the Mexican law, the grant was made on the 29th of the same month. According to the regulations for granting lands, it was necessary that a plan or sketch of its lines and boundaries should be presented with the petition; but, in the construction of these regulations, the governors appear to have exercised a discretionary power to dispense with it under certain circumstances. It was not required in the present instance. The reason assigned for it in the petition was, the difficulty of preparing it, the land lying in a wilderness country, on the confines of the wild Indians. This reason was deemed by the governor sufficient, and the grant issued without it; and in deciding upon the validity of a Mexican grant, the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution. It is the duty of the court to protect rights obtained under them, *which would have been regarded as vested and valid by the [* 562] Mexican authorities. And as the governor deemed himself

authorized, under the circumstances, to dispense with the usual plan, and his decision, in this respect, was sanctioned by the other officers intrusted with the execution of the law, it must be presumed that the power he exercised was lawful, and that the want of a plan did not invalidate the grant. The fact that the country where the land was situated was such a wilderness, and bordered by such dangerous neighbors, that no plan could then be prepared, is proved by these documents; and that fact, officially admitted, is worthy of consideration, when we come to the inquiry whether there was unreasonable delay in taking possession. For, by dispensing with the plan or draft on that account, which was a condition precedent, it may justly be inferred that the conditions subsequent were not expected by the governor to be performed, nor their performance intended to be exacted, until the state of the country would permit it to be done with some degree of safety.

Now, it is well known that Mexico, and California as a part of it, had, for some years before, been in a disturbed and unsettled state, constantly threatened with insurrectionary and revolutionary movements; and in this state of things, the uncivilized Indians had become more turbulent, and were dangerous to the frontier settlements, which were not strong enough to resist them. It is in proof that this state of things existed in the Mariposas valley when this grant was made; that it was unsafe to remain there without a military force; and that this continued to be the case until the Mexican government was overthrown by the American arms. In the very year of the grant, a civil war broke out in the province, which ended by the expulsion of the Mexican troops; and Colonel Fremont entered California at the head of an American force, in 1846, and the country was entirely subdued, and under the military government of the United States, in the beginning of 1847, and continued to be so held until it was finally ceded to the United States under the treaty of Guadalupe Hidalgo.¹ In February, 1847, while California was thus occupied by the American forces, Alvarado conveyed to Colonel Fremont.

Now, it is very clear, from the evidence, that during the continuance of the Mexican power, it was impossible to have made a survey, or to have built a house on the land, and occupied it for the purposes for which it was granted. The difficulties which induced the governor to dispense with a plan when he made the grant, increased instead of diminishing. We have stated them very briefly in this opinion, but they are abundantly, and in more detail, proved [*563] by the testimony in the *record. Nobody proposed to settle on it, or denounced the grant for a breach of the conditions.

¹ 9 Stats. at Large, 922.

Fremont v. United States. 17 H.

And at the time when the Mexican authorities were displaced by the American arms, the right which Alvarado had obtained by the original grant remained vested in him, according to the laws and usages of the Mexican government, and remained so vested when the dominion and control of the government passed from Mexico to the United States. The same causes which made it impossible to take possession of the premises and obtain a survey, made it equally impracticable to obtain the approval of the departmental assembly. The confusion and disorder of the times prevented it from holding regular meetings. It is doubtful whether it met more than once after this grant was made; and its proceedings, from the state of the country, were necessarily hurried, and the assembly too much engrossed by the public dangers to attend to the details of private interests. It does not appear that the governor ever communicated this grant to the assembly. At all events, they never acted on it. And the omission or inability of the public authorities to perform their duty, cannot, upon any sound principle of law or equity, forfeit the property of the individual to the State. It undoubtedly disabled him from obtaining what is called a definitive title, showing that all the conditions had been performed; but it could not divest him of the right of property he had already acquired by the original grant, and re-vest it in the State.

And certainly no delay is chargeable to Alvarado or Fremont after California was subjected to the American arms. The civil and municipal officers, who continued to exercise their functions afterwards, did so under the authority of the American government. The alcalde had no right to survey the land or deliver judicial possession, except by the permission of the American authorities. He could do nothing that would in any degree affect the rights of the United States to the public property; and the United States could not justly claim the forfeiture of the land for a breach of these conditions, without showing that there were officers in California, under the military government, who were authorized by a law of congress to make this survey, and deliver judicial possession to the grantee. It is certain that no such authority existed after the overthrow of the Mexican government. Indeed, if it had existed, the principles decided in the case of Arredondo, 6 Pet. 745, 746, would furnish a satisfactory answer to the objection.

Two other objections on the part of the United States to the confirmation of this title remain to be noticed. The first condition annexed to the grant prohibits the grantee from selling, alienating, or mortgaging the property, or subjecting it to taxes, * entail, or any other encumbrances. And by the laws of [* 564]

Mexico, the grantee could not, it is said, sell or convey the land to any one but a Mexican citizen, and that Fremont was not a Mexican citizen at the time of the conveyance under which he claims.

In relation to the first objection, it is evident from the disturbed state and frequent revolutions in the province, that there was some irregularity in the conditions annexed to grants, and that conditions appropriate to one description of grant, from clerical oversight, or some other cause, were sometimes annexed to others. This is manifestly the case in the present instance; for this condition is in violation of the Mexican laws, and could not, therefore, be legally annexed to this grant. For by the decree of the Mexican congress, of August 7, 1823, all property which had been at any time entailed, ceased to be so from the 20th of September, 1820, and was declared to be, and continue absolutely free; and no one in future was permitted to entail it. And the prohibition, in the 13th article of the regulations of 1824, to transfer property in mortmain, necessarily implies that it might be aliened and transferred in any other manner.

But if this condition was valid by the laws of Mexico, and if any conveyance made by Alvarado would have forfeited the land under the Mexican government as a breach of this condition, or if it would have been forfeited by a conveyance to an alien, it does not by any means follow that the same penalty would be incurred by the conveyance to Fremont.

California was at that time in possession of the American forces, and held by the United States as a conquered country, subject to the authority of the American government. The Mexican municipal laws, which were then administered, were administered under the authority of the United States, and might be repealed or abrogated at their pleasure; and any Mexican law, inconsistent with the rights of the United States, or its public policy, or with the rights of its citizens, were annulled by the conquest. Now, there is no principle of public law which prohibits a citizen of a conquering country from purchasing property, real or personal, in the territory thus acquired and held; nor is there any thing in the principles of our government, in its policy or its laws, which forbids it. The Mexican government, if it had regained the power, and it had been its policy to prevent the alienation of real estate, might have treated the sale by Alvarado as a violation of its laws; but it becomes a very different question when the American government is called on to execute the Mexican law.

And it can hardly be maintained that an American citizen,
[* 565] who makes a *contract or purchases property under such circumstances, can be punished in a court of the United

States with the penalty of forfeiture, when there is no law of congress to inflict it. The purchase was perfectly consistent with the rights and duties of Colonel Fremont, as an American officer and an American citizen ; and the country in which he made the purchase was, at the time, subject to the authority and dominion of the United States.

Still less can the fact that he was not a citizen of Mexico impair the validity of the conveyance. Every American citizen, who was then in California, had at least equal rights with the Mexicans ; and any law of the Mexican nation which had subjected them to disabilities, or denied to them equal privileges, were necessarily abrogated without a formal repeal.

In relation to that part of the argument which disputes his right, upon the ground that his grant embraces mines of gold or silver, it is sufficient to say, that, under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. The only question before the court is the validity of the title. And whether there be any mines on this land, and, if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court, by the act of 1851.

Some difficulty has been suggested as to the form of the survey. The law directs that a survey shall be made, and a plat returned, of all claims affirmed by the commissioners. And as the lines of this land have not been fixed by public authority, their proper location may be a matter of some difficulty. Under the Mexican government, the survey was to be made or approved by the officer of the government, and the party was not at liberty to give what form he pleased to the grant. This precaution was necessary, in order to prevent the party from giving it such a form as would be inconvenient to the adjoining public domain, and impair its value. The right which the Mexican government reserved to control this survey, passed, with all other public rights, to the United States ; and the survey must now be made under the authority of the United States, and in the form and divisions prescribed by law for surveys in California, embracing the entire grant in one tract.

Upon the whole, it is the opinion of the court, that the claim of the petitioner is valid, and ought to be confirmed. The decree of the district court must, therefore, be reversed, and the case remanded, with directions to the district court to enter a decree conformably to this opinion.

Catron, J., dissenting. On the 23d of February, 1844, Juan B. Alvarado petitioned the governor, Micheltorrena, for ten leagues of land, alleging that the tract which he then owned was not sufficient to support his stock of cattle, and which he was desirous to increase. He at the same time proposed to contribute to the spreading of the agriculture and industry of the country. And he further declared, that, because of the good intentions of the governor in favor of the improvements of the country, the petitioner hoped for a favorable consideration of his demand.

The governor referred the petition to the alcalde of San José, who reported that the land was vacant, that the petitioner was meritorious, and that there was no objection to making the grant. In this report, Jimeno, the government secretary, concurred.

The governor declared the petitioner meritorious for his patriotic services, and therefore worthy of a preference; and accordingly, on the 29th of February, 1844, proceeded to grant to Alvarado, for his personal benefit and that of his family, the tract of land known by the name of Mariposas, to the extent of ten square leagues, within the limits of the Snow Mountain, (Sierra Nevada,) and the rivers known by the names of the Chanchilles, of the Merced, and the San Joaquin, "the necessary requirements, according to the provisions of the laws and regulations having been previously complied with, subject to the approbation of the departmental assembly, and the following conditions" — that is to say:—

1. "He shall not sell, alienate, nor mortgage the same, nor subject it to taxes, entail, or other encumbrance."

2. "He may inclose it, without obstructing the roads or the right of way. He shall enjoy the same freely, without hindrance, destining it to such use or cultivation as may best suit him; but he shall build a house within a year, and it shall be inhabited."

3. "He shall solicit from the proper magistrate the judicial possession of the same, by virtue of this grant, by whom the boundaries shall be marked out, on the limits of which he (the grantee) shall place the proper landmarks."

4. "The tract of land granted is ten sitios de ganado mayor, (ten square leagues,) as before mentioned. The magistrate who may give the possession, shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper use."

5. "Should he violate these conditions, he will lose his right to the land, and it will be subject to being denounced (pretended for) by another."

[* 567] * "Therefore, I command that these presents being held

firm and binding, that the same be registered in the proper book and delivered to the party interested, for his security, and other purposes."

The foregoing conditions, in effect, are imposed by the colonization law of 1824, and the regulations made in pursuance thereof, by the chief executive of Mexico, in 1828 ; both of which were equally binding upon the territorial governors, when they exercised the granting power.

The concession, according to these laws, could only be made for agricultural purposes and for raising cattle. Colonization was the great object of the law of 1824 ; and to this end alone was its execution prescribed and arranged by the regulations of 1828.

Much stress has been laid on the fact that, in the concession to Alvarado, patriotic services are referred to as a reason why a preference was given to the grantee in obtaining the land ; that preference was founded on the 8th section of the act of 1824, which provides : " That in the distribution of lands, Mexican citizens are to be attended to in preference, and no distinction shall be made among these, except such only as is due to private merit and services rendered to the country." Private merit or public services could form no part of the consideration for grants made for the purposes of grazing and cultivating ; nor had the governor of a territory power to grant for any other purpose. The 11th section of the act of 1824 reserved the power to the supreme executive to alienate lands in the territories in favor of civil or military officers of the federation. This grant, therefore, stands on the footing of others, and is subject to the same conditions. Alvarado's petition, and the governor's concession founded on it, must be taken together ; they are a necessary part of the contract between the applicant and the government, under the colonization law of 1824, and the regulations of 1828, which, with inconsiderable exceptions, remained in full force when this concession was applied for and issued.

The government of the United States received the legal title to the public lands in California by treaty, and encumbered under the laws of nations with all the equitable rights of private property therein, that they were subject to in the hands of Mexico at the time of their transfer ; and the question here is, what interest in the land claimed, Alvarado or his assignee had, when the treaty was made ? The consideration for the grant was a performance of its leading conditions on the part of the grantee ; the principal condition being, the inhabitation of the land, in the manner and within the time prescribed. As to the terms of this condition, the regulations of 1828 declare, that the party soliciting *for lands, shall describe [* 568] as distinctly as possible, by means of a map, the land asked for ; and a record shall be kept of the petitions presented and grants

made, with the maps of the lands granted; and the governor was required, by the 11th rule of the regulations, to designate to the colonist the time within which he was bound to cultivate or occupy the land; "it being understood that if he does not comply, the grant of the land shall remain void;" and by the 12th rule, the grantee was required to prove before the municipal authority that he had cultivated or occupied, so that a record should be made of the fact thus established, "in order that he might consolidate and secure his right of ownership, and have power to dispose freely of the land." Accordingly, certain conditions were inserted in the grant as part of it, by the second of which, the colonist was bound to build and inhabit a house on the land granted, within one year. This was, therefore, the time allowed from the date of the grant, for the fulfilment of the important condition on which an equitable claim to it arose.

In this case, the land was granted to Alvarado in February, 1844, and three years after, he conveyed to Colonel Fremont, the petitioner. No possession had been taken by Alvarado before that time, nor any further act done to acquire a title, than the first step of obtaining the concession; and if this step gave him an equity to have a perfect title from the Mexican government, then his equity is the same as against the United States.

In the first place, the 11th rule above cited declares that no right accrues to the colonist unless he occupies the land; and in the next place, the act of congress of March 3, 1851, by the authority of which we are acting, declares, (§ 11,) that the board of commissioners and the courts, deciding on California land claims, shall be governed by the decisions of the supreme court of the United States, so far as they are applicable.

By these decisions, it has been settled for many years, that a Spanish concession, containing a condition of inhabitation and cultivation, the performance of which is the consideration to be paid for an ultimate perfect title, is void, unless the condition was performed within the time prescribed by the ordinances of Spain. It was so held in the case of *The United States v. Wiggins*, 14 Pet. 350. And the opinion then given was followed in the cases of *Buyck*, 15 Pet. 222, and of *Delespine*, *ibid.* 319. But the rule was more distinctly laid down in the case of *The United States v. Boisdoré*, 11 How. 96. There the court said: "The grantee might have his land surveyed, or he might decline; he might establish himself on the land, or decline; these acts rested wholly in his discretion. But, if he failed to take possession, and establish himself, he had [* 569] no claim to a title; his concession or * first decree, in such case, had no operation. So the supreme court of Louisiana

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held, in *Lafayette v. Blanc*, 3 Louisiana Ann. 60, and in our judgment, properly. There, the grantee never having had actual possession under his concession, the court decided that he could set up no claim to the land, at law or in equity. This case followed *Hooter v. Tippet*, 17 La. Rep. 109. We take it to be undoubtedly true, that, if no actual possession was taken, under a gratuitous concession, given for the purpose of cultivation, or of raising cattle, during the existence of the Spanish government, no equity was imposed on our government to give any consideration or effect to such concession, or *requête*."

The case of *Glenn et al. v. United States*, 13 How. 259, maintains the same doctrine. It was there declared, that a promise of performance, (that is, to inhabit and cultivate,) on the part of Clamorgan, the grantee, was the sole ground on which the Spanish commandant made the concession; that actual performance, by cultivating the land, was the consideration on which a complete title could issue; and that so far from complying, Clamorgan never took a single step after his concession was made, and in 1809, conveyed for the paltry sum of fifteen hundred dollars; and under these circumstances, (says the court,) we are called on to decide in his favor, according to the principles of justice; this being the rule prescribed to us by the act of 1824, and the Spanish regulations. The court, then, declares, that the claim had no justice in it, and to allow it would be to sanction an attempt at an extravagant speculation merely; referring to *Boisdoré's* case, as having established the principle that occupation was indispensable, and the real consideration of grants for purposes of inhabitation or cultivation.

But, it is insisted here that no possession was taken of the land, nor a survey of it made, because of the danger from hostile Indians in its neighborhood. If this were a valid excuse, then on the Indian borders grants would carry no substantial conditions with them. The point is settled in the cases of *Kingsley*, 12 Pet. 484, and of *De Villemont*, 13 How. 267, that where the hostility of Indians was alleged as an excuse for not occupying the land, and it appeared that the hostility existed when the grant was made, and was merely continued, that then the grantee could not be permitted to set up such an excuse.

Alvarado manifestly took the grant at his own risk, and if he did not intend to perform the condition of inhabitation, or could not do it, he must bear the consequences. To hold otherwise would be to subvert the manifest design of the colonization laws of Mexico, by reserving indefinitely, to single individuals, * large [* 570 bodies of uncultivated and unoccupied lands, in the instance before us, amounting to fifty thousand arpens.

It is, I think, impossible to exempt this claim from the settled doctrine, that occupation is a consideration indispensable to its validity. It is thus laid down in various instances, and especially in the cases above cited, of Boisdoré, of Glenn *et al.* and of De Villemont; nor can this claim be sustained, unless they are overruled, and the act of congress, declaring that this court is bound by them, disregarded. The district judge, who rejected this claim in California, held that he could not do so, and, in my opinion, held properly. I give the conclusion of his opinion as it is found in the record.

“But, in the case at bar, the time for making a settlement is limited to one year. So far as appears, Alvarado never even saw the tract he assumed to convey to Fremont, nor was any settlement effected by the latter until a year after the ratification of the treaty. It cannot be urged in this, as in other cases, that the grant was not made complete by the assent of the assembly, owing to accident or the neglect of the governor, for Alvarado himself says it could not be submitted to them without the *diseno*, or plan, which, on account of the hostilities of the Indians, he was unable to furnish, and yet the danger from that source existed at the time of his application, for he assigns it to the governor as a reason why the *diseno* did not accompany the petition.

“It is urged that the political disturbances of the country contributed to prevent the settlement; but I think it clear, from the evidence, that the principal, if not the only reason why it was not effected by Alvarado or Fremont until after the treaty, was the danger from the savages, and that this danger existed to substantially the same degree before and after the grant.

“Upon the whole, after a most careful consideration of this case, and with every desire to give the claimant the full benefit of every favorable consideration to which he is entitled, I have been unable to resist the conclusion that the case of Glenn, of De Villemont, and of Boisdoré, lay down for me rules of decision applicable to this case, and from which I am not at liberty to depart.”

2. The next question is, whether a concession, which is in fact a floating land warrant, seeking a location on any part of a large region of country containing nine hundred square miles, can be confirmed by this court, acting as it does, of necessity, in a judicial capacity? The assumption thus to locate the ten leagues, asserts power in the claimant to have the land surveyed at his discretion, either in a body, or in single tracts, so that they adjoin each [* 571] other at any point of the respective surveys; in the latter form he did have them surveyed, and, in this form of location, the grant was declared valid by the board of commissioners.

I understand the Mexican laws as not to allow any such undefined floating claims. It is impossible to recognize them under the act of 1824, the object of which was to colonize particular tracts of land.

By that act, the petitioner was bound to describe the land asked for "as distinctly as possible, by means of a map," according to which it was granted; and next, he was required to solicit from the proper magistrate (usually the *alcalde* of the next *pueblo*) judicial possession of the land described; and this magistrate was required to survey and designate the boundaries, on the limits of which the party interested was bound to place proper landmarks. Now, that Alvarado had no separate interest to any specific tract of land, was admitted on the argument; but it was insisted that he was, and his assignee is, a tenant in common, with the government, in all the country situate in a region called Mariposas, lying within the limits of the Sierra Nevada, and the rivers known by the names of Chanchilles, of the Merced, and the San Joaquin. In any part of this large scope of country it is assumed the Mexican magistrate and surveyor could have laid off the ten leagues, and that the surveyor-general of California can do the same now.

This claim, standing on the concession alone, lost its binding operation in one year, and became void if the land was not designated within that time, unless the time was enlarged, or new conditions prescribed by the governor. So I understand the eleventh rule of the regulations of 1828.

To hold that the Mexican government designed to leave in force for an indefinite length of time large undefined concessions, that might be surveyed at the election of the claimant at any time and at any place, to the hindrance of colonization and to the destruction of other interests, is an idea too extravagant to be seriously entertained, so far from it, the Mexican colonization laws contained more positive provisions, to the end of granting distinct and known tracts of land to colonists, than did any Spanish laws that have at any time been brought to the consideration of this court.

It is proper to remark that, by the Mexican laws, an assignee could not be put into possession of land by force of the first decree or concession. Alvarado alone could apply for judicial possession. By the 11th rule, a possession could be transferred when it was duly proved and recorded; but the *alcalde* could not recognize an assignee as a colonist, because by the 3d rule the governor was bound to judge of the fitness of the candidate; *and, having decided [* 572] as to his fitness, the *alcalde* was held to an execution of that decision, and could not recognize an assignee.

We are here called on to award a patent for a floating claim of

fifty thousand arpens of land in the gold region of California, to an assignee whose vendor claimed under the colonization laws of Mexico, but who never was a colonist, who never did a single act under his contract to colonize, and who, it is admitted, could not have obtained a definite title from the political department of the territory of California, to wit, from the departmental assembly, whose province it was to pass on and confirm grants to colonists.

At law, this claim has no standing; it cannot be set up in an ordinary judicial tribunal. It addresses itself to us as founded on an equity incident to it by mere force of the contract, no part of which was ever performed. The claim is as destitute of merit as it can be, and has no equity in it; nor is it distinguishable from that of Clamorgan, which was pronounced invalid in the case of *Glenn et al. v. The United States*.

If this claim is maintained, all others must likewise be, if the first step of making the concession is proved to have been performed by the acting governor; as no balder case than the one before us can exist in California, where the grant is not infected with fraud or forgery.

And this presents a very grave consideration, affecting preëmption rights. The country in California is filled up with inhabitants cultivating the valleys and best lands, and where they rely almost as confidently on their government titles, founded on acts of congress, as if they had a patent for the land. No other American title is known in the State of California, except such as are founded on the preemption laws.

These agricultural people are quite as much contractors with the United States as the Mexican grantees were contractors with their government. By the acts of March 3, 1853,¹ and March 1, 1854,² congress promised to each settler who was on the land March 1, 1854, or might settle on it within two years thereafter, 160 acres, to include his residence, at one dollar and twenty-five cents an acre. This was a policy to populate the country, which is yet in progress. That these occupants have an equitable interest, and hold the land as purchasers, is the settled doctrine of the department of public lands, which exercises jurisdiction over them. Much of labor and money has been expended on the faith that a preference-right was a safe title, and exempt from floating Mexican concessions, such as that made to Alvarado, and now in litigation here. And this was most natural. Incipient Mexican claims had no standing in an ordinary court of justice, and congress created special courts to try

¹ 10 Stats. at Large, 244.

² *Ib.* 268.

them, *and prescribed the laws and rules by which these [* 573] courts should be governed in their adjudications; and among other rules it was provided, that the decrees of the supreme court of the United States should govern where they applied. They thus had given to them the force of a legislative enactment. These decisions apply as a governing rule most emphatically to the requirement of a specific location of Spanish claims, to which the court had held litigants with a strictness often complained of, but always necessary for the protection of the public and its alienees; and it was the necessary consequence that cultivators of the soil should believe themselves safe from the ruin that lurks in a floating claim, familiar even to western ploughmen, many of whom remember the history of exhausting and fierce litigation in their own families for the paternal hearth, and who relied on the firm and consistent decisions of this court to protect their new homes on the Pacific. Nor do I think that any pre-emption right can be included in a survey of the Alvarado claim, so as to make the preference-right part of the land belonging to the grant, because Col. Fremont's claim has never been located, and our decree cannot disturb innocent owners until it is located. It was so held by this court, in the case of *Menard v. Massey*, 8 How. 309. And unless that case is disregarded, one having a preference-right cannot be deprived of his possession by this floating claim.

CAMPBELL, J., dissenting.

The concession, upon which the decree in favor of the United States was pronounced, is for ten square leagues, to be located in a district of country which contains above one hundred square leagues. To the concession there is no plan or design to indicate the place of location; nor was there any survey, delivery of judicial possession, occupancy, or improvement, at any time prior to the treaty of Guadalupe Hidalgo. The conditions to the validity of a grant prescribed by the laws of colonization of Mexico, and which were specifically annexed to the grant under consideration, made these necessary.

The case of *Smith v. The United States*, 10 Pet. 326, and many others where the doctrine of that case was applied, is, in my opinion, conclusive of this. The claim arose on a petition of St. Vrain to the governor-general of Louisiana, in November, 1795, praying for a grant, in full property to him and his heirs, of ten thousand superficial arpens, with the special permission to locate in separate pieces, upon different mines, of whatever nature they may be, without obliging him to make a settlement; which grant, as prayed for, was granted by the governor-general, in February, 1796.

* The court, in that case, collect some of the principles [* 574]

which had been employed by the court in the settlement of claims under the treaties of Florida¹ and Louisiana.² "We have held," they say, "that, in ascertaining what titles would have been perfected if no cession had been made to the United States, we must refer to the general course of the law of Spain; to local usage and custom; and not what might have been done by the special favor or arbitrary power of the king or his officers."

"It has also been distinctly decided," they say, "in the Florida cases, that the land claimed must have been served from the general domain of the king, by some grant which gives it locality by its terms, by reference to some description, or by a vague general grant, with an authority to locate afterwards by survey, making it definite; which grant or authority to locate must have been made before the treaty of cession (that is, 24th January, 1818.)"

The court, then coming to the case under consideration, describes it as a "grant to vest in the petitioner a title in full property to all the lands in the province containing minerals, which he might at any time locate, in quantities to suit his own pleasure." "Its condition at the cession was precisely as it was at the date of the grant; there was no evidence that the grantee had done or offered to do any act, or made any claim or demand, asserting or affirming any right under the grant." The court say, that, at the date of the surrender of Louisiana, "there was not an arpen on which his right had any local habitation; until a location was made, it was a mere authority to locate, which he might have exercised at his pleasure, both as to time and place, by the agency of a public surveyor authorized to separate lands from the royal domain by a survey pursuant to a grant, warrant, or order of survey."

"At the time of the cession, nothing had been so severed, either by a public or private surveyor, or any act done by which the king could in any way be considered as a trustee for St. Vrain, or any portion of the ten thousand arpens; and there was no spot in the whole ceded territory in which he had, or could claim, an existing right of property. An indispensable prerequisite to such right was some act by which his grant would acquire such locality as to attach to some spot; until this was done, the grant could by no possibility have been perfected into a complete title. It is clear, therefore, that the integrity of the public domain had in no way been affected by this grant, (in March, 1804,) at the treaty of cession."

Here was a grant, "in full property," from the highest political authority having the power to make grants—without condition.

¹ 8 *Stats. at Large*, 252.

² *Ib.* 200.

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*or limitation as to the manner or time of the survey—pro- [* 575]
nounced invalid, for the reason that, when the sovereign
parted with the territory, it had no definite location nor limit.

The concession now before the court agrees with the one we have
considered as being indefinite, attaching to no particular spot in a
large extent of territory. The Mexican governor of California de-
clares it to be the property of the grantee by the letters then issued,
not in full property, but as “subject to the approbation of the most
excellent departmental assembly, and to conditions underwritten.”
Among these conditions are those of a survey and delivery of pos-
session by a public officer, and occupancy and improvement in a
limited period. For very nearly four years, while the land remained
as the property of Mexico, no act was done, nor right asserted to any
portion of the ten square leagues, and nothing was performed to dis-
tinguish them from any other part of the public domain. The integrity
of the public domain in this district had never been disturbed at the
treaty of Guadaloupe Hidalgo, even by a visit from the grantee.

The case of *Rutherford v. Greene's Heirs*, 2 Wheat. 196, does not
conflict, in my judgment, with the case I have cited. The question
in that case was, whether an act of a state legislature, appropriating
a certain number of acres in a particular district of country, “to be
allotted” by public officers named in the act, and, after that allot-
ment was perfected, whether it amounted to a legal or equitable title
(for the case was in chancery) to the particular lot of land, against
a claimant under a subsequent entry or purchase from the State.
To make that case parallel to this, the claim of the grantee should
have rested upon the general grant only, without the completing proc-
ess of the allotment. The analogy fails, in respect to the present
case, at the point where the question of doubt is suggested.

In the case of *Smith*, this court considered the effect of the acts
of the grantee, performed after the treaty of cession, towards lo-
cating the grant, and whether they had any relation back to the date
of the title, so as to unite with it and give definiteness to it. And
the court say, that the surveys must be performed by public officers,
under a legal authority, as a public trust, and that this was the law
of both the United States and of Spain. And that the United
States, having acquired the territory by cession, were entitled to hold
it discharged of all claims, where the specific lands could not be
identified by the description in the grant, or a supplementary survey.

The doctrine of this case has been applied with uniformity by this
court, in a long series of cases, some of which with a degree
of strictness bordering upon severity. *Lecompte v. United States*, 11 How. 119; *United States v. King*, 3 *ibid.* 773; S.

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C. 7 *ibid.* 833; *United States v. Wiggins*, 14 Pet. 334; *Bissell v. Penrose*, 8 How. 317.

The non-fulfilment of these conditions, it was competent to Mexico to overlook or to forgive.

It is probable that, in the lax administration of her laws, in the distant province of California, all investigation would have been avoided, if the cession to the United States had not been made. It is equally within the power of congress to remit the consequences attaching to the omissions, and to concede as a grace, what, in California, might have been yielded from indolence or indulgence.

But congress has chosen to deal with the subject of titles in California upon principles of law, embracing in that term the whole body of jurisprudence applicable to the subject; and that the solution of all the questions arising from them shall be made by courts of justice acting upon their fixed rules of judgment. Among the guides it has directed us to follow, are the decisions of this court in analogous cases. In my opinion, the cases I have cited control this case, and I do not feel at liberty to depart from what is to me their clear and manifest import.

18 H. 1, 80, 539, 556, 557; 19 H. 368; 20 H. 59; 22 H. 443; 23 H. 812; 24 H. 346;
1 B. 541; 2 B. 17; 1 Wal. 400; 5 Wal. 444.

GRAY P. WEBB, and others, Plaintiffs in Error, v. JOHN DEN, Lessee
of POLLY WEATHERHEAD.

17 H. 576.

An act of the legislature of Tennessee, providing that where a deed had been *de facto* registered for more than twenty years, it should be deemed and taken to have been lawfully registered, though operating in respect to deeds registered before, and offered in evidence after its passage, is not a retrospective law, within the meaning of the constitution of that State.

A conveyance of a naked legal title to the equitable owners of the land, under no other description of the grantees than "the legatees and devisees of the late A B," passes the title to the persons named in the will of A B, as his legatees and devisees.

ERROR to the circuit court of the United States for the middle district of Tennessee. The case is stated in the opinion of the court.

Gillet, for the plaintiffs.

No counsel *contra*.

[* 577] * GRIER, J., delivered the opinion of the court.

On the trial of this case, the plaintiff below having shown that the lessor of plaintiff was one of the children of Anthony Bledsoe,—also the will of Anthony Bledsoe, and a grant of five thou-

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sand acres of land, by the State of North Carolina, to Nicholas Lang — offered in evidence a copy of a paper writing purporting to be a deed from John J. Lang, Basset Stith, and Mary, his wife, and others, devisees of the legal estate, to the “legatees and devisees of the late Anthony Bledsoe,” for the one fourth part of said tract, or, twelve hundred and fifty acres, by certain metes and bounds. This copy is certified by the register of Maury county, Tennessee, as there recorded on the 11th of January, 1809. The defendants objected to the admission of this copy as evidence, “because it was not duly proved, acknowledged, or authenticated, so as to entitle the same to registration, and there was no proof of the acknowledgment or privy examination of Mary Stith, the *feme covert*, and that the registration of said deed, being unauthorized, a copy would not be read.” The court overruled the objection and permitted the deed to be read, and the exception to this ruling is chiefly relied on as a ground for reversing the judgment of the court below.

The acknowledgment certified with this deed, which purports to have been taken in open court, in Halifax county, North Carolina, at November sessions, 1807, is admitted not to have been such as the registration acts then required, nor was it certified under the seal of the court, as required by law. But an act was passed in 1839, by the legislature of Tennessee, the 9th section of which contains the following provision: That whenever * a deed has [*578] been registered “twenty years or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate on which the same has been registered has not been transferred to the register’s books, and no matter what has been the form of the certificate of probate or acknowledgment.”

In the early settlement of most of our States, the forms of conveyances of land were very simple; and they were usually drawn either by the parties themselves, or by persons equally ignorant of the proper forms of certificates of acknowledgment required by law.

In some States, the statutes concerning acknowledgments and registry were stringent, while the practice was loose and careless. And, in some, the courts by unnecessary strictness in their construction of the statutes, added to the insecurity of titles, in a county where too many have acted on the supposition that every one who can write is fit for a conveyancer. The great evils likely to arise from a strict construction applied to the *bonâ fide* conveyances of an age so careless of form, have compelled legislatures to quiet titles by confirmatory acts, in order to prevent the most gross injustice.

The act in question is one of these; it is a wise and just act; it governs this case, and justifies the court in admitting this deed in evidence. It was registered in 1809, and some of the grantees have been in possession under it ever since. After such a length of time, the law presumes it to have been registered on lawful authority, without regard to the form of certificate of probate or acknowledgment. As a legal presumption, it is conclusive that the deed was properly acknowledged, although the contrary may appear on the face of the papers.

It is not a "retrospective law" under the constitution of Tennessee, which the legislature is forbidden to pass. It is prospective; declaring what should thereafter be received in courts as legal evidence of the authenticity of ancient deeds. It makes no exception as to the rights of married women, and the courts can make none. Informalities and errors in the acknowledgments of *feme covert*s, are those which the carelessness and ignorance of conveyancers were most liable to make, and which most required such curative legislation.

The registration being thus validated, copies of such deeds stand on the same footing with other legally registered deeds, of which copies are made evidence by the law.

The objections to the form of this deed, that it has no effective words of grant to convey a fee, nor states a consideration, nor sufficiently describes the grantees, cannot be supported. It is [*579] true, it is a very informal conveyance, but it contains *enough within it to show its validity. It appears that Anthony Bledsoe, as locator of the land for Lang, was entitled by their contract to one fourth. The whole legal title was in Lang's devisees, the equitable title to one fourth in Bledsoe's devisees. The deed does not contain the words give, grant, bargain, and sell, &c., but only "a release and quitclaim forever, unto the legatees and devisees of Anthony Bledsoe, deceased." The will of Bledsoe is in evidence. The deed, by this description, necessarily refers to that instrument to ascertain the persons who are such "legatees and devisees," and thus far incorporates it. It contains, therefore, a sufficient description of the grantees.

It has no words of inheritance, because it is a release of the bare legal title to equitable owners in fee, on partition between them as tenants in common. This appears on the face of the deed. The consideration of the conveyance is stated to be a release, on behalf of the grantees, "of all claims under a certain contract," &c. By the common law, there is a distinction between a release by one joint-tenant to another, and the same as between tenants in common; the first requires no words of inheritance, but the latter does. But this

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technical distinction is founded on feudal reasons with respect to livery of seisin, which have no application where the release is to the equitable owner in fee. By the statutes of Tennessee, registering a deed is the only livery of seisin required.

But whether the deed passed the legal estate in fee or not, was a question not arising in the case, as the lessor of plaintiff was one of the devisees of Anthony Bledsoe, and therefore one of the original grantees in the deed, and had a legal as well as equitable estate.

The objection to the record of partition between the heirs or devisees of Nicholas Lang, because it was *res inter alios acta*, ought not to have been made. The authenticity of the record was not disputed, and if it had any legal bearing whatever on the title of the plaintiff, the defendants, who had as yet shown no title, cannot object to the muniments of plaintiffs' title, when offered in evidence, whether they be deeds, wills, or partitions, "because they are *res inter alios acta*."

The judgment of the circuit court is, therefore, affirmed.

JANE A. COY, in her own Right, and as Guardian of LUCY, BENJAMIN, MARY, AMELIA, and MAHITABLE COY, her Minor Children, Complainants and Appellants, v. CHARLES MASON.

17 H. 580.

Bill in equity to set aside a partition on the ground of fraud.

The record was so defective in respect to parties and evidence, that the decree of the district court, dismissing the bill, was affirmed.

APPEAL from the district court of the United States for the district of Iowa. The case is stated in the opinion of the court.

Platt Smith, for the appellants.

Chase, contra.

* M'LEAN, J., delivered the opinion of the court. [* 580]

This case is brought before us by a writ of error to the district court for the district of Iowa.

In an Indian treaty, made the 4th of August, 1824,¹ between the United States and the Sac and Fox tribes of Indians, for a large cession of territory within the limits of the State of Missouri and else-

¹ 7 Stats. at Large, 229.

where, there was reserved the small tract of land lying between the rivers Des Moine and the Mississippi, and the section of the line of the treaty between the Mississippi and the Des Moine, which is intended for the use of the half-breeds belonging to the Sac and Fox nations; they holding it, however, by the same title, and in the same manner, that other Indian titles are held.

On the 30th of June, 1834, congress passed an act¹ relinquishing all the right and title of the United States to the above land, and vested the title in the half-breeds, who, at the passage of the act, under the Indian title, had a right to the same.

[*581] *In 1840, Josiah Spalding and others commenced proceedings in the district court of Lee county, Iowa, for a partition of the tract among the respective owners, against Euphrasine Antaga and others. Notice was given by publication in a newspaper, and, after some delays, a partition was made by the consent of parties.

The complainants, in their bill, represent that Elizabeth Cardinell, *alias* Elizabeth Antaga, was a half-breed of the Sac and Fox nation of Indians, and the sister of Euphrasine Antaga, and in her lifetime was entitled to one full original share in the above tract. That in the year 1833, the said Elizabeth Cardinell died, leaving St. Paul, Eustace, Eli, Pierre, and Julien Cardinell, her children and only heirs. That these children were all half-breeds, born before the 4th of August, 1824, and were entitled, in their own right, each to a share in the land. That after the 30th of June, 1834, and before the 14th day of April, 1840, all of the said heirs died, except Julien Cardinell, who became the owner of the shares of his mother and brothers.

In 1841, the land was divided into one hundred and one shares, among persons claiming to be the owners. Samuel Marsh, William E. Lee, and Edward C. Delevan were trustees for certain claimants, called The New York Company, and were made defendants to the petition for partition; and they claimed one share under Eustace Cardinell, and two thirds of a share under Elizabeth Antaga, by the heirs of Eli and Eustace Cardinell. But the trustees filed no title papers or exhibits, showing their right to the one and two thirds shares claimed by them, and to which Julien was entitled.

The complainants further represent, that when the petition for partition was filed, Julien was a resident of Prairie du Chien, in the territory of Wisconsin, a distance of more than two hundred miles from the half-breed tract, and that he had no notice, &c. That the consent to the decree was a fraudulent device by the parties, and is consequently void. That Marsh, Lee, and Delevan had no right to

¹ 4 Stats. at Large, 720.

the one and two thirds shares claimed ; that they drew the said shares under the agreed plan of division, without right, &c.

The complainants allege that they claim under a deed of conveyance from Julien Cardinell, dated 25th of February, 1848, and by descent, the one and two third shares. These shares, it is alleged, were disposed of by Marsh, Lee, and Delevan to Mason, the defendant, in 1852, who now claims them ; that he is now in possession of the land, enjoying the rents and profits, and refuses to account, &c. Other allegations of fraud are made, of which Mason had notice, &c., and the complainants pray that the decree of partition may be set aside and annulled, as fraudulent *and void, and that [* 582] a repartition may be had, and that the complainants may be allowed their interest in the land, &c.

The defendant demurs to the bill, and also answers, not waiving his demurrer, &c.

He admits that Elizabeth Cardinell was a half-breed, but denies that the children, whose names are stated in the petition, were half-breeds of the Sac and Fox nations, their father being a white man. He admits the death of the persons stated by the complainants in their petition, and that Marsh, Lee, and Delevan, as trustees, &c., claimed one share under Eustace Cardinell, and two thirds of a share under Elizabeth Cardinell, called Antaga, through Eli and Eustace Cardinell, heirs, &c. But he denies that the trustees ever drew or received the said one and two thirds of a share, or any portion thereof, as set forth in the petition, or in any other manner ; and he denies the allegations of fraud, &c.

“The parties agreed to the following facts: That Elizabeth Cardinell was a half-breed of the Sac and Fox nations of Indians, and died in 1826, leaving Julien Cardinell, and his four brothers, St. Paul, Eustace, Eli, and Pierre, her children, whose father was a white man. Julien was born in 1821, and his brothers prior to the year 1824. All the children of the said Elizabeth were living on the 30th of June, 1834, and all, except Julien, died unmarried before 1840, leaving no children. In 1848, Julien conveyed to Coy and Brace, by a deed which is to be produced in court. Coy died in 1849, leaving the present plaintiff as his widow, and a family of children. Brace died about the same time, leaving also a widow and children, who reside in Iowa.”

“The title of the half-breeds of the Sac and Fox nations of Indians appears by the treaty of August, 1824, and the act of congress of June, 30, 1834. It is admitted that there were one hundred and one true original half-breeds who were entitled to shares.”

“The record of the partition suit is to be regarded as in evidence,

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and either party may use any portion of it in the supreme court, whether the same is used in the district court or not; but the following facts are admitted to be true, unless contradicted by the record. The suit for partition was commenced in the spring of 1840. Legal notice thereof was given by publication, and no other service was made on any of the defendants in that suit. The case would have regularly come up for hearing in October, 1840, but was postponed till April following, to give more abundant time for all persons interested to appear and present their claims. Marsh, Lee, and Delevan were defendants in that suit; they claimed upwards of sixty [*583] shares, and among *them were the one and two third shares, as set forth in the petition in this suit. In the judgment of partition, forty-one shares were allowed them. Elizabeth Cardinell is the same person as Elizabeth Antaga, and is a sister of Euphrasine Antaga."

"The defendant in this suit has become a purchaser of the interests owned by Marsh, Lee, and Delevan, as will be more fully shown by their deed to him. More than \$100,000 of the purchase-money remains unpaid. Marsh, Lee, and Delevan are not residents of the State of Iowa."

"At the time of the partition, Julien Cardinell was absent from the territory of Iowa, residing in Prairie du Chien, more than two hundred miles distant. The country at that time was new. He was ignorant and illiterate. There was no guardian appointed for him, nor any person present in court to represent his rights. There is no exhibit on record tending to show that Marsh, Lee, and Delevan, or either of them, had any right to the shares of the said Julien, or to any interest derived from either of his brothers, or from his mother. The half-breed tract contains about 120,000 acres of land. Keokuk is a large town situated on the tract."

"The claimants in the tract are very numerous, amounting to several hundreds. It would be impracticable to make them all parties. In the partition suit no one but Marsh, Lee, and Delevan laid claim to any share under any of the Cardinells, with the exception of one half of one share, which was drawn by Ebenezer D. Ayres."

"The whole tract was divided, but no part was set off to the said Julien, and no mention is made of his rights in said record. He had no guardian and no notice, except the constructive notice by newspaper publication in Iowa."

The bill prays that the decree of the district court, on the ground of fraud, may be declared void, so far as the rights of the complainants are affected, and that a repartition of the land may be ordered. But there is no evidence of fraud, unless it be inferred from the facts

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admitted. The facts in regard to the partition suit are admitted, unless contradicted by the record; but the record of that proceeding is not before us, and without it we are unable to determine the extent of the admissions. If there were evidence of fraud in the partition, we could not take jurisdiction of that proceeding, as the parties interested are not before us; and for the same reason, the district court had no jurisdiction of this part of the case.

The answer denies that the one and two thirds shares claimed were allowed to Marsh, Lee, and Delevan, and there is nothing in the admission of facts which disproves the answer in this respect. The defendant admits that the trustees claimed these *shares, [* 584] but it is not admitted that they were allowed to them in the partition. The evidence does not identify and establish, as against the defendant, the right claimed by the complainant. The decree of the circuit court, which dismissed the bill, is affirmed.

MOSES WANZER and JABEZ HARRISON, Appellants, v. BENNETT R. and J. H. TRULY.

17 H. 584.

A vendee of personal property may be relieved in equity from the payment of a just proportion of the purchase-money, if the vendor, who warranted the title, has died insolvent, and under a decree of a court of equity the purchaser has been obliged to pay a sum of money to extinguish a paramount title to a part of the property.

A judgment against the vendee, for the entire purchase-money, in a suit against him as the garnishee of the vendor, does not deprive the vendee of his title to such relief; as, between him and the judgment creditor, the vendee has the better equity.

APPEAL from the circuit court of the United States for the southern district of Mississippi. The case is stated in the opinion of the court.

Coxe, for the appellants.

Brent and May, contra.

CAMPBELL, J., delivered the opinion of the court. [* 584]

The appellee (B. R. Truly) purchased of J. R. Herbert, in 1836, in Mississippi, five slaves, for whom he gave two notes, one of which for \$3,575, was payable in March, 1838, at a banking-house in Brandon, with ten per cent. interest till paid. Another note, for the same sum, has been collected. During the year 1837, the appellants

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recovered a judgment in the circuit court against Herbert, who had absconded in insolvent circumstances. In 1839, a process of garnishment served upon the appellee before named, who acknowledged the existence of this note, and a judgment was rendered against him. An execution issued, a levy was made, a [* 585] forthcoming bond was taken, *and a forfeiture of it returned; upon this bond, J. H. Truly was a surety. In 1840, an injunction was obtained by the appellees, upon the allegation (*inter alia*) that they had heard that the slaves, which form the consideration of the notes, were the property of certain minor children in Alabama, whose guardian had fraudulently removed and sold them to Herbert. This bill was before this court and was dismissed. 5 Howard, S. C. R. 141.

While the suit was in this court, the minor children referred to, instituted suits in the court of chancery in Mississippi, (by sequestering the property,) against the appellee or his assigns, and which resulted, during the progress of the present suit, in the recovery of two of the slaves, and nine tenths interest in a third, with the damages for their loss of service.

The original bill was filed in the present suit, in anticipation of this result, and alleges the death of Herbert and his vendor, (Nicholson,) in Texas, insolvent; and that the appellees were willing to release their claim on the slaves as derived from them, and surrender the defence of the suits to the appellants, and call upon them to take their place. The fact of the recoveries subsequently is brought to the notice of the court through supplemental bills. The circuit court decreed a perpetual injunction in favor of the appellees. The averment of the outstanding paramount title in the wards of Nicholson, and which the appellees had only heard of from common report, which appeared in the former suit, was disposed of by this court as insufficient, for that the appellees then "retained possession of the property without a threat of molestation."

The rule of the courts of Mississippi, as well as of this court, is, that, except in special cases, a vendee in possession cannot, at law or in equity, contest the payment of the purchase-money stipulated in a contract of sale, by an alleged defect of title, but reliance must be placed on the covenants it contains.

Gilpin v. Smith, 11 S. & M. 109; Dennis v. Heath, *ibid.* 206; 2 Wheat. 13; 3 Pet. 310; 3 Porter, 127; 19 John. 77.

The disturbance of the possession by the orders and process of the court of chancery, the imminence of the danger from the title propounded in those suits, and the insolvency and death of the warrantors, were facts which authorized the circuit court to take equitable

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cognizance of the present complaint of the appellees, and to administer relief. The rule of the civil law, that the price of the sale of real property cannot be recovered by the vendor if the vendee has been disturbed in his possession by prior encumbrances or paramount titles, or has just grounds for apprehension on that account, (Pothier de Vente, § 280,) is the rule of chancery where there has been fraud, or where the *covenants of warranty are inadequate [* 586] to the protection of the vendee by reason of the insolvency of the vendor.

In *Bumpus v. Platner*, 1 Johns. Ch. R. 213, Chancellor Kent said: "I consider an eviction at law an indispensable part of the claim to relief here, on the mere ground of a failure of consideration." And in *Abbott v. Allen*, 2 Johns. Ch. R. 519, he said: "If there be no fraud in the case, the purchaser must resort to his covenants if he apprehends a failure or a defect of title, and wishes relief before eviction."

But in the last case he suggests, "that existing encumbrances which appeared to admit of no dispute," or "where an adverse title is put forward," "or an adverse proceeding threatened," might support an injunction till the title was ascertained at law. And in *Johnson v. Gere*, 2 Johns. Ch. R. 547, he administered relief in accordance with these suggestions. A learned successor of this eminent jurist, with these cases before him, determined that when "the covenants have been actually broken, and the grantor is insolvent, a court of equity may restrain him from proceeding to collect the whole amount of the purchase-money, and may offset the damages occasioned by the breach of the covenants of seisin or warranty, against such unpaid purchase-money. *Woodruff v. Bunce*, 9 Paige, 443.

And this conclusion is supported by well-considered adjudications in other courts of the States. 2 Dana, 276; 1 *ibid.* 303; 5 Leigh, 39, 607; 8 Ala. Rep. 920; 1 Black. 384; *Carver v. Miller*, 10 Ala. Rep.

The question arises whether the equity we have considered, of the vendee to protection from the insolvency of the vendor, has been modified or defeated by the pursuit of the attaching creditor in the circuit court. The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by investing the creditor with a judicial power to collect and apply the amount due. The claim of the attaching creditor against the defendant is only extinguished by a satisfaction of his demand by the garnishee. The garnishee is entitled to make at law legal defences, and his equities must be sought in a court of chancery. 17 Ala. 455; 5 Met. 263; 2 Wash. C. C. R. 488.

The statutes of Mississippi do not assign any extraordinary effect

to the judgment condemning the debt in the hands of the garnishee, nor do they enlarge the rights of the attaching creditor beyond those of any other assignee of a *chose in action*. The equity of the vendee to be indemnified from the purchase-money in his hands, for a breach of the covenants of warranty by an insolvent vendor, originates in the contract, and inheres to it so long as any part of it is executory. The equity of the attaching creditor does not arise in the contract, and is subsequent to its formation. In claiming the benefit of the fund, he renders no service to the vendee, and releases none of his rights against the vendor. He may fail in realizing hopes or anticipations by the defeat of his suit against the garnishee, but his judgment against his debtor remains in operation. Where a party contracts specifically for property, pays money, acquires a legal title without notice of an equity, a court of chancery will not disturb his legal position. But there is no principle upon which a court of chancery is required to imply that a proceeding by a defendant, through the intervention of his creditor, to subject a legal demand, unconnected with any equity—a demand which equity would not permit him to collect in his own name, in consequence of the failure of consideration, shall divest the garnishee of equitable claims and defences.

The rule of law is accurately stated by Vice-Chancellor Wigram, who says “that a creditor, under his judgment, might take in execution all that belongs to his debtor, and nothing more. He stands in the place of his debtor. He is a purchaser who, by the terms of his conveyance, takes, subject to any liability under which the debtor himself held the property.” *Whitworth v. Gaugain*, 3 Hare, 416; s. c. 1 Cr. & Phil. 325; *Langton v. Horton*, 1 Hare, 549; *Hutch. Dig. Miss. Stat.* 912, § 8.

The most restricted view of the doctrine of these cases is, that the equitable rights of the garnishee remain unaffected by the judgment or the proceedings under the judgment, till the execution is executed, unless the garnishee is accessory to some act, or guilty of some omission or laches, by which their efficacy is impaired. 1 McN. & G. 437; 8 Ala. Rep. 867.

When the execution is executed, the claim of the attaching creditor upon the defendant in the suit (his original debtor) is satisfied. He has purchased thereby the issues of his garnishment process, for an adequate consideration, and could not, consequently, be called to refund at any future time. This view of the rights of the vendee is sustained by Chancellor Walworth, in *Sanford v. McLean*, 3 Paige, 117, where the effect of a judgment is stated, and where a purchaser under it is said to be subject to every equitable claim thereon which

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was prior in point of time to the judgment, of which he had notice at or before the sale of the property." In many of the States the policy has been adopted of placing the claims of judgment creditors upon the same footing as purchasers, in reference to unrecorded conveyances, and of assigning to creditors' liens a higher rank than they occupy in the general system of equity jurisprudence; but, in the absence of such a policy, the rules we have quoted must determine their dignity.

* The appellees cannot be charged with any laches, or [* 588] conduct calculated to deceive or mislead the attaching creditor, but the only complaint of them is, that they insisted upon their title to relief prematurely, and with too much pertinacity. Whatever effect may be visited upon such a course of conduct, we know of no rule that would authorize the forfeiture of their claim to relief. We concur, therefore, in the leading principle upon which the cause was determined in the circuit court. But we do not agree with the court in their allowance of a perpetual injunction without requiring an account.

The contract of the appellee was for five slaves, for whom only one half the price has been paid. The whole of them were possessed for many years, when two and nine tenths of another were recovered, with damages for the detention of two.

The damages recovered were compromised, and only a portion of them paid. No notice was given to the appellants of the offers or acceptance of the compromise.

The appellants are complainants in equity, seeking to enforce a covenant of indemnity, and must receive relief upon the principles on which the court habitually extends it; that is, upon the principle of doing equity, upon a principle of compensation for the injury sustained. This is the rule stated in *McGinnis v. Noble*, 7 Watts & S. 454, and applied in a similar case to this, of *Jones v. Lightfoot*, 10 Ala. R. 17. The appellees, upon their eviction, are entitled to the value of the slaves they have lost at the date of the decrees, and the damages, costs, and expenses, actually paid upon the decrees of the court of chancery in Mississippi.

We direct the reversal of the decree of the circuit court, and remand the cause, with directions that these amounts be ascertained, and the judgment at law in the circuit court against the appellees and their sureties be credited with this sum, as of that date, and that the costs of this court be paid by the appellees.

Taney, C. J., M'Lean, J., and Daniel, J., dissented.

DANIEL, J. I dissent from the decision by the majority of the court

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in this case; and in expressing my disagreement, I have felt no greater perplexity in reconciling that decision with every principle of justice, than in reconciling it with itself. For, to my apprehension, it clearly appears that if there ever was a decision which could be characterized as *felo de se*, it is precisely the decision made in this case.

This controversy had its commencement by a proceeding [* 589] * familiarly known and practised in several of the States, and particularly in the south and southwest, usually denominated a foreign attachment. By this proceeding, a person whose debtor may have absconded, or who has no visible property which can be reached directly by legal process, is authorized to attach in the hands of a third person who may be indebted to the debtor of the attaching party, an amount equal to the demand due to the latter. Under such proceeding, the plaintiff in the attachment is placed in the precise position of his debtor, with respect to the defendant, and can either legally or equitably recover of him nothing more than what was due from the defendant to the debtor of the plaintiff. In other words, the plaintiff stands affected and is bound by every legal and equitable right appertaining to the parties of whose transactions and relation to each other he seeks to avail himself. Avoiding a detail of the facts and proceedings had in this cause, further than is necessary to its correct comprehension, those facts and proceedings are prominently and simply these. That in the year 1836, the appellant, Bennett R. Truly, purchased five slaves of one John R. Herbert, and for the purchase-money for those slaves executed two promissory notes of \$3,575 each. That Herbert, shortly after the sale and purchase of these slaves, removed to Texas, where he died insolvent. That Wanzer and Harrison, being creditors by judgment of this insolvent person, Herbert sued out an attachment against Truly, and obtained a judgment thereon for the sum of \$3,575, the amount of one of the notes given for the purchase of the slaves, the other note for the like amount having been paid.

That suits had been instituted by certain persons whose guardian, during their minority, had run off with those slaves, from the State of Alabama, and sold them to Herbert, of whom they were purchased by Truly, who was ignorant, when he purchased, of any defect in the title to them. That in the suits brought for these slaves, a recovery had taken place in behalf of the true owners, and that the slaves had been surrendered by Truly, who had also, by a compromise with the agent of the persons who had obtained a decree for the slaves, delivered to said agent four other slaves, in satisfaction of the hires of those slaves, and of the costs incurred by their true owners' prosecuting their title to them.

Upon the foregoing facts, this court have by their decision affirmed that Herbert, having had no title to the slaves, could convey none to his vendee, and that the slaves sold by him having constituted the only consideration for the notes given by Truly, by the recovery of those slaves by title paramount, that consideration had failed or been taken away, and therefore there *remained no foun- [* 590] dation for a claim upon Truly, either on behalf of Herbert or of any person occupying his precise position.

Had the decision of this court terminated here, or at a conclusion seemingly inevitable from the principles and terms of that decision, namely : the absolute denial to Herbert, or to Wanzer and Harrison, representing Herbert, of any description of right under the contract with Truly, that decision would have been reconcilable with justice, and consistent with itself. But this court goes on to argue that, from the evidence in the record, it appears that Truly has not responded to any regular and specific rate or demands for the hire of the slaves, whilst they were in his possession or under his control, and therefore there should be an account taken in this cause, showing on the one hand the interest upon the claim asserted through Herbert, and on the other the amount of the hires of the slaves, regularly and specifically computed, with the view (if indeed such view is comprehensible for any conceivable reason) that, should there turn out to be an excess of hires beyond the interest upon the claim asserted through Herbert, that excess may be applied to the benefit of Wanzer and Harrison.

But the error of this direction by the court is exposed by the following inquiries. Suppose not one cent of the hires of these slaves has been paid, to whom do those hires belong? To whom would Truly be accountable for them? He would be accountable, surely, to those to whom the subjects constituting the source of those hires belonged, and not to the purloiner of their property, nor to persons deducing title from such wrong-doers. Nay, the payment to the latter of any portion of those hires would not exempt the payer from reclamation from the true owners.

Then let it be supposed that Truly may have compromised with the true owners the claim for hires, either by the payment of an amount less than their actual or estimated aggregate, or by the transfer of property in kind, (slaves, for instance, as it appears were delivered to the true owners,) will this court undertake to deny to those parties the right to compromise their own interests? It may have been that the delivery of the four slaves, in satisfaction for the hires, was more satisfactory and more advantageous to the persons accepting them, than any other arrangement which could have been

made. But should these rightful claimants have been willing to surrender any portion of their interests, or from motives wise or unwise, should have relinquished the whole of them, could such a proceeding have given validity to the fraudulent pretensions of Herbert, or of those who seek to profit by his dishonesty? The decision of this court having declared the contract with Herbert void for an entire want or failure of consideration, unless the maxim [* 591] *ex nihilo nihil fit* shall be reversed, and this court shall affirm that something can arise from nothing, it passes my powers to perceive how any right, legal or equitable, can spring from this contract with Herbert, thus declared to be void, and that alleged right, too, existing in one who, in legal intendment, is Herbert himself. If the contract with Herbert is valid, then the judgment upon the attachment should be enforced to its full extent; if it was invalid, then in the same extent it should be repudiated; but this court, while it condemns the contract itself, attempts to deduce from it and to enforce consequences which necessarily imply its validity, and which can result only from regarding it as valid. In this aspect of the decision, I cannot but regard it as injurious to the appellees, as irreconcilable with sound principles of logic or of law, as irreconcilable with itself. I forbear here any remark as to the periods at which the grounds of defence in the court below came into existence, or were tangible and practicable, or as to the manner in which they were relied on, in opposition to the demand against the appellee. These are matters entirely distinct from the essential merits of those grounds of defence, and any examination of them seems unnecessary, or rather to be excluded, by the decision here, upon the character of the defence itself.

18 H. 217; 19 H. 849; 1 Wal. 99.

ELI AYRES and THOMAS N. NILES, Complainants on cross-bill, Appellants, v. HIRAM CARVER, JOSEPH W. MATTHEWS, JAMES BROWN, JACOB THOMPSON, JOHN P. JONES, WILLIAM H. DUKE, and JOHN D. BRADFORD.

17 H. 591.

A cross-bill should be disposed of in connection with the original bill; and a decree, dismissing a cross-bill alone, is not final, and no appeal therefrom lies.

[* 592] * APPEAL from the district court of the United States for the northern district of Mississippi. The case is stated in the opinion of the court.

Adams for the appellants.

Cushing, contra.

NELSON J., delivered the opinion of the court.

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This is an appeal from a decree of the district court of the United States for the northern district of Mississippi.

A bill was filed by Hiram Carver, of the State of Alabama, against Joseph W. Matthews, of Mississippi, and some two hundred others, part of them residents of this State, part of Tennessee, but most of them without any residence mentioned, setting forth the treaty made with the Chickasaw tribe of Indians, at Pontotoc Creek, in 1832,¹ confirmed in 1833, by which said tribe ceded to the government all their lands east of the Mississippi River; and also a treaty with the same tribe, 24th May, 1834,² confirmed 1st July, the same year, modifying the provisions of the first one; which treaties provided for certain reservations of land to be granted in fee to the heads of Indian families; and for the survey and sale of the residue, as in the case of other public lands, with this difference: that the lands remaining undisposed of at public sale, should be liable to private entry, at one dollar and twenty-five cents per acre for the first year thereafter; at one dollar the second; at fifty cents the third; at twenty-five cents the fourth, and thereafter at twelve and a half cents per acre.

The bill further states, that down to January, 1843, there remained subject to private entry, at twelve and a half cents per acre, several tracts of land particularly set forth in a schedule annexed; and that on that day the complainant offered to purchase, at the land-office, all the lands described in the aforesaid schedule, at the price of twelve and a half cents per acre; and, for this purpose, made an application to A. J. Edmondson, the register of said land-office, but that the said register illegally refused to permit him to make the said purchase; that he also tendered to J. F. Wray, the receiver, the amount of the purchase-money for the tracts he had thus applied to enter, but that he refused to receive the money or issue the proper certificates.

* The complainant further states that since his appli- [* 593] cation, as above set forth, the register and receiver have permitted the defendants to enter and purchase the several tracts, in sections and subdivisions, and at the times mentioned in the schedule above referred to; and charging that the said defendants had notice of the rights and equities of the complainant at the time.

The complainant then prays to make all the defendants, before enumerated, parties to the bill; and as they are very numerous, that the court will designate a small portion of them to represent the whole body, and upon whom personal service of the subpoena shall be made. And further, that the several entries and purchases made by the defendants be set aside; and that the complainant be permitted to

¹ 7 Stats. at Large, 381.² *Ib.* 450.

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enter and purchase the several tracts at the price of twelve and a half cents per acre, or that the defendants be decreed to convey the same to the complainant, and to deliver up the possession.

It appears from the record, the court, on the application of the complainant, ordered that the cause should proceed against seven of the defendants, James Brown, Jacob Thompson, John P. Jones, William H. Duke, John D. Bradford, Thomas N. Niles, and Eli Ayers, and upon whom process was afterwards served, and who appeared in said cause.

Separate answers were put in by these defendants, setting forth the entry and purchase at private sale from the register and receiver of the several portions of the tract claimed by each of them, and also patents for the same from the government. To which answers replications were filed.

It further appears from the record, that at this stage of the proceedings, Thomas N. Niles and Eli Ayers, two of the defendants, filed a cross-bill against the complainant, Carver, and all of their numerous co-defendants, setting forth the substance of the original bill, and then charging that they had obtained a title to the several tracts in controversy, or to portions of them, long prior to the title claimed by their co-defendants, setting forth also particularly the source of title. They pray that this cross-bill may be heard at the same time with the original bill of Carver, and that any claim he may set up to the several tracts of land claimed by them in the cross-bill, may be set aside and annulled; also, that the other defendants to the cross-bill be required to produce their patents to any and all of the lands claimed by them, that they may be cancelled, and that possession be delivered to the complainants.

It further appears from the record, that afterwards the complainants moved the court that the five co-defendants, who had appeared in the original bill, and the complainant in that bill, be made [* 594] defendants to represent the other defendants mentioned, * as they are so numerous as to render it inconvenient to make all of them parties to the suit; which motion was granted.

These defendants were afterwards personally served with process, or appeared in the cause, and demurred to the cross-bill; which demurrer was sustained by the court, and the bill dismissed. The case is now before us on an appeal from this decree.

It will have been seen from the brief reference to the original bill in this case, that Carver, the complainant, sought to establish an equitable title to large tracts of the public lands, which had been laid off in townships, ranges, and sections, situate in the State of Mississippi; having offered to comply, as he alleges, with the law providing

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for the entry and purchase at private sale, of the several tracts, but was prevented from making the entries and from obtaining the necessary certificates, by the illegal and unwarranted acts of the register and receiver at the land-office. The bill is filed against the defendants, who had subsequently entered and paid for the land, obtained the necessary certificates, and upon which patents have since been issued.

The defendants are alleged to be very numerous, and for this reason the court below dispensed with the necessity of making all of them parties; and directed that their interests should be represented by some seven of them, on whom process was directed to be served.

Without intending to express any definitive opinion in this matter, we must say that it is difficult to see any interest or estate in common among these several defendants, that would authorize the rights of the absent parties to be represented in the litigation by those upon whom process has been served, and who have appeared to defend the suit. Their title to the land claimed by the complainant is separate and independent, without any thing in common, it would seem, that could have the effect to make a decree against one binding upon the others, or even require them to join in the defence. *Smith et al. v. Swormstedt et al.* 16 How. 288. We do not intend, however, to pursue this branch of the case.

As it respects the cross-bill, it may be proper to observe that the matters sought to be brought into the controversy between the complainants in that, and their co-defendants, do not seem to have any connection with the matters in controversy with the complainant in the original bill. Nor is it perceived that he has any interest or concern in that controversy. These two complainants in the cross-bill set up a title to the lands in dispute, which, they insist, is paramount to that of their co-defendants, and seek to obtain a decree to that effect, and to have the possession delivered to them. This is a litigation exclusively between these parties, and with which the complainant *in the original bill should not be embarrassed, [* 595] or the record encumbered. The same matter has been set up in their answer to the original bill, against the equitable title claimed by the complainant, presenting the only issue in which he is interested, and upon which the questions between them can be heard and determined.

A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defence to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill.

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It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it.

It is said by Lord Hardwicke, that both the original and cross-bill constitute but one suit, so intimately are they connected together. *Field v. Schieffelin*, 7 Johns. Ch. R. 252.

The office of a cross-bill has been very fully discussed at this term, by Mr. Justice Curtis, in the case of *Victorie Shields et al. v. Barrow*; and I need not, therefore, pursue it, but refer only to that opinion for the true doctrine on the subject.

It is manifest, from this brief reference to the doctrine, that any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit, and, therefore, not the subject of an appeal to this court, under the 22d section of the judiciary act. The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for reëxamination, • when the party aggrieved by any determination in respect to the cross-bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the cause.

For these reasons, the appeal in this case must be dismissed, for want of jurisdiction, and the case remanded to the court below.

Catron, J., concurred in the judgment, but dissented from the reasoning.

CATRON, J. In this instance, the bill and cross-bill are [* 596] but one suit, and * ought regularly to have been heard at the same time; and if an appeal was prosecuted from the decree to this court, by any party who supposed himself to be aggrieved, the whole suit would necessarily be brought up.

Here the cross-bill was heard and dismissed, pending the original suit of which it was part. The decree pronounced was partial; and as no appeal lies from any but a final decree, and this decree not being final, the consequence is, that this court has no jurisdiction to examine the merits presented and insisted on in the argument. All that we can properly do is to dismiss the appeal, because it brought up nothing. Now, as to the matters discussed in the opinion just delivered, founded on a copy of the proceedings had below, and filed in this court, I can only say that I have no opinion in regard to them,

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never having even read the record further than to ascertain that this court had no jurisdiction in the supposed case presented to us. I therefore concur in the judgment that the case shall be dismissed, for want of jurisdiction, without going further.

Order. This cause came on to be heard on the transcript of the record from the district court of the United States for the northern district of Mississippi, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court, that this cause be and the same is hereby dismissed, for the want of jurisdiction.

JOHN C. HAYS, Plaintiff in Error, v. THE PACIFIC MAIL STEAMSHIP COMPANY.

17 H. 596.

An ocean steamer, owned and registered in New York, and regularly plying between Panama and San Francisco, and ports in Oregon, remaining in San Francisco no longer than is necessary to land and receive passengers and cargo and in Benicia, only for repairs and supplies, is not subject to taxation by the State of California.

* THE case is stated in the opinion of the court. [* 597]

Brent and May, for the plaintiff.

Davidge and Vinton, contra.

NELSON, J., delivered the opinion of the court.

This is a writ of error to the district court for the northern district of California.

The suit was brought in the district court, by the company, to recover back a sum of money which they were compelled to pay to the defendant, as taxes assessed in the State of California, upon twelve steamships belonging to them, which were temporarily within the jurisdiction of the State.

The complaint sets forth, that the plaintiffs are an incorporated company by the laws of New York; that all the stockholders are residents and citizens of that State; that the principal office for transacting the business of the company is located in the city of New York, but, for the better transaction of their business, they have agencies in the city of Panama, New Grenada, and in the city of San Francisco, California; that they have, also, a naval dock and ship yard at the port of Benicia, of that State, for furnishing and repairing their steamers; that, on the arrival at the port of San Fran-

cisco, they remain no longer than is necessary to land their passengers, mails, and freight, usually done in a day; they then proceed to Benicia, and remain for repairs and refitting until the commencement of the next voyage, usually some ten or twelve days; that the business in which they are engaged, is in the transportation of passengers, merchandise, treasure, and the United States mails, between the city of New York and the city of San Francisco, by way of Panama, and between San Francisco and different ports in the territory of Oregon; that the company are sole owners of the several vessels, and no portion of the interest is owned by citizens of the State of California; that the vessels are all ocean steamships, employed exclusively in navigating the waters of the ocean; that all of them are duly registered at the custom-house, in New York, where the owners reside; that taxes have been assessed upon all the capital of the plaintiffs represented by the steamers in the State of New York, under the laws of that State, ever since they have been employed in the navigation, down to the present time; that the said steamships have been assessed in the State of California and county of San Francisco, for the year beginning 1st July, 1851, and [* 598] ending 30th June, 1852, claiming the * assessment as annually due, under an act of the legislature of the State; that the taxes assessed amount to \$11,962.50, and were paid under protest, after one of the vessels was advertised for sale by the defendant, in order to prevent a sale of it.

To this complaint the defendant demurred, and the court below gave judgment for the plaintiffs.

By the 3d section¹ of the act of congress of 31st December, 1792, it is provided that every ship or vessel, except as thereafter provided, shall be registered by the collector of the district, in which shall be comprehended the port to which the ship or vessel shall belong at the time of her registry, and which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, nearest to the place where the husband, or acting and managing owner usually resides; and the name of the ship, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters of not less than three inches in length; and if any ship or vessel of the United States shall be found without having her name, and the name of the port to which she belongs, painted in the manner mentioned, the owner or owners shall forfeit fifty dollars.

And by the act of 29th July, 1850, (9 Stats. at Large, 440,) it is

¹ 1 Stats. at Large, 288.

provided, that no bill of sale, mortgage, or conveyance of any vessel shall be valid against any person other than the grantor, &c., and persons having actual notice, unless such bill of sale, mortgage, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled.

These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessels of the plaintiffs was the port of New York, where they were duly registered, and where all the individual owners are resident, and where is also the principal place of business of the company; and where, it is admitted, the capital invested is subject to state, county, and other local taxes.

These ships are engaged in the transportation of passengers, merchandise, &c., between the city of New York and San Francisco, by the way of Panama, and between San Francisco and different ports in the territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient *inducements [* 599] by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the States.

Now, it is quite apparent, that if the State of California possessed the authority to impose the tax in question, any other State in the Union, into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion as great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, &c., which in no respect can affect the question as to the *situs* of the property, in view of the right of taxation by the State.

Besides, whether the vessel, leaving her home port for trade and commerce, visits, in the course of her voyage or business, several

ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them, temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port. Our merchant vessels are not unfrequently absent for years, in the foreign carrying trade, seeking cargo, carrying and unloading it from port to port, during all the time absent; but they neither lose their national character nor their home port, as inscribed upon their stern.

The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State, is familiar in the admiralty law, and she is subjected, in many cases, to the application of a different set of principles. 7 Pet. 324; 4 Wheat. 438.

We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with [* 600] *their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid.

An objection is taken to the recovery against the collector, on the ground, mainly, that the assessment under the law of California, by the assessors, was a judicial act, and that the party should have pursued his remedy to set it aside according to the provisions of that law.

We do not think so. The assessment was not a judicial, but a ministerial act, and as the assessors exceeded their powers in making it, the officer is not protected.

The payment of the tax was not voluntary, but compulsory, to prevent the sale of one of the ships.

Our conclusion is, that the judgment of the court below is right, and should be affirmed.

Daniel, J., dissented, and Campbell, J., concurred in the judgment of the court, upon the ground stated in his opinion.

DANIEL, J. I dissent from the decision of the court in this case, it being my opinion that neither the circuit court nor this court could take jurisdiction over the parties to this suit; and that, therefore, this cause should be remanded to the district court, with directions to dismiss it for want of jurisdiction.

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CAMPBELL, J. I concur in the judgment. But I concur only in consequence of the facts stated in the declaration, and which are admitted by the demurrer. The material fact is, that the vessels were *in transitu*, having no *situs* in California, nor permanent connections with its internal commerce.

WILLIAM CHRISTY, Plaintiff in Error, v. LODOVICK P. ALFORD, Administrator of HENRY D. BULLARD, deceased.

17 H. 601.

Under the 15th section of the limitation laws of Texas, if the possession of two or more persons in succession, holding in privity with each other, under title or color of title, makes out the prescribed term, the bar is complete, though no one has held for the whole required time; and the 14th section of that law has no effect upon the 15th section.

ERROR to the district court of the United States for the district of Texas. The case is stated in the opinion of the court.

Crittenden, Hughes, and Lawrence, for the plaintiff.

Hill and Henderson, contra.

CURTIS, J., delivered the opinion of the court.

This case comes before us by a writ of error to the district court for the district of Texas. It was an action of trespass, to try the title to a tract of land. On the trial, the defendant relied on the 15th section of the statute of limitations, passed in 1841, by the congress of the then Republic of Texas, which is in the following words: "Every suit to be instituted to recover real estate, as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after cause of action shall have accrued, and not afterwards, saving," &c.

In reference to this defence, the district judge instructed the jury, that a possession under the said 15th section, might be in two or more, holding in privity, one under another; and if the possession of both so holding will make out the term prescribed by said section, and he sued has title or color of title, then the bar will be effectual.

The plaintiff excepted to this instruction, and the jury found a verdict for the defendant.

Several objections to this instruction have been relied on in this court. The first is, that a holding by two persons, for the space of three years, one claiming and holding in privity with the other, does not satisfy the statute; that the person who is sued, must himself have held for the space of three years. The argument is, that the period of three years begins to run when *"cause [*602]

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of action shall have accrued;" that the statute does not say when a cause of action, or the first cause of action accrued, but, when cause of action accrued; that cause of action accrues against each tenant, in succession, when he enters, whether he come into the land in privity with the preceding occupant or not; for each is a trespasser by an unlawful entry; that the statute refers, not to the cause of action which first accrues to the plaintiff by reason of an unlawful entry, but to the cause of action which accrues to him by reason of the entry of the particular person sued. It is conceded, that this construction of the statute is not in conformity with that put upon the 21 Jac. I. c. 16, and its reënactments in this country; but it is insisted that the particular terms of the statute in question call for a different interpretation, because the bar therein provided for is confined to certain cases therein enumerated, and is not applicable to all cases of adverse holding for the space of three years.

It must be admitted, that the bar afforded by the 15th section of the statute, is confined to the particular cases therein described; but the question is, whether that description excludes cases where there has been an adverse holding for three years, by different persons holding in privity with each other; and we are of opinion that such cases are included in the 15th section. We think both the language of the law and its subject-matter, as well as the analogous cases respecting the interpretation of similar statutes, call for this construction. The plaintiff would read the law as if it had said, "within three years next after cause of action shall have accrued" against the person sued. But these words are not in the law, nor would the court be justified in interpolating them. It is true, the only cases enumerated in the law are suits against persons in possession under title or color of title. But the definitions of the terms, title and color of title, which immediately follow, are: "By the term title, as used in this section, is meant a regular chain of transfer from and under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfer down to him, her, or them, in possession, without being regular, as if one or more of the memorials, or muniments, be not registered or not duly registered," &c. It is quite plain, therefore, that when this section speaks of a suit against one in possession under title or color of title, it is not confined to cases in which the defendant was the first to enter under that title. If he be in a regular chain of transfer from and under the sovereignty of the soil, or in a consecutive chain of such transfer, though informal in its instruments, he is a defendant within the descriptive words of this [*603] section; and it is wholly immaterial whether he was the first taker from the sovereign of the soil or not.

The words, "as against him, her, or them in possession, under title or color of title," restrict the benefit of this bar to those persons who hold under such a title; the words, "shall be instituted within three years next after cause of action shall have accrued, and not afterwards," prescribe the length of time during which cause of action must have existed, by reason of an adverse holding under such a title. And as, by the very terms of the act, the person setting up this bar must be in a chain of transfer from the sovereignty of the soil down to himself, it necessarily follows that the defendant setting up the bar must be in privity with his predecessors in the title, and that he cannot rely on the title or possession of any one under whom he does not claim. There is nothing in the act to restrict the party sued from relying on the possession of any predecessor in that title under the sovereignty of the soil, which has come to himself, and the purpose of the act requires that he should be allowed to do so. That purpose was to give repose to such titles by three years' adverse possession. But if the construction contended for by the plaintiff in error were adopted, three years' possession under that title, by one person, would not quiet that title. If a descent were cast, or an alienation took place, after three years had elapsed, a right of action would accrue against the heir or purchaser who should enter, and that action would not be barred because the defendant had not himself held possession for three years.

This would be an extraordinary anomaly. At the common law, a descent cast tolled the right of entry, because the heir came in by operation of law; and a discontinuance was worked by the alienation of a tenant in tail, so that the alienee could not be entered on by the heir in tail. These rules of the common law were changed, in part, by the 32 Henry VIII. c. 33, and have been wholly abrogated in most of the United States; but that the title of the heir or alienee should be worse than that of the ancestor or grantor, and that an action, wholly barred against the latter, should be revived and be in force upon an entry by the former, under a title already protected by the act, would indeed be strange. We see nothing in the language or objects of the law, and certainly there is nothing in the decisions under analogous laws, calling for this interpretation.

Though we do not know that the supreme court of Texas has had occasion to decide the precise question here presented, that learned court has repeatedly expressed views of this section of the act of 1841, in accordance with those we have above given. In *Wheeler v. Moody*, 9 Texas R. 377, that court, in "considering a de- [*604] fence set up under the 15th section of this act, say: "The possession need not be continued by the same person; but, when

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held by different persons, it must be shown that a privity existed between them." So, in *Horton v. Crawford*, 10 Texas, 390, speaking of the time when the cause of action accrues, within the meaning of this section, they say: "When does the cause of action accrue? Unquestionably, at the instant of possession taken under the circumstances specified in the statute; namely, under title or color of title, according to the definition of those terms given in the law itself." See, also, *Portis et ux v. Hill's Administrator*, 3 Texas, 273.

We understand, therefore, that our views of this statute are in accordance with those of the supreme court of Texas, so far as that learned court has had occasion to express any opinion on the subject; and we hold, in the terms laid down by them in the case of *Wheeler v. Moody*, that, under the 15th section of the act of 1841, the possession need not be continued by the same person, and that, consequently, the instruction of the district court, in this particular, was correct.

But it is further objected, that the instruction given did not require that the first holder should have been in under title or color of title, but only that the person sued should have title or color of title; and that this instruction would allow the benefit of this bar to one having title, and a possession of less than three years, if he claimed in privity with another who had previously possessed without title. But the instruction must be taken with reference to the admitted facts upon which it was given. Those facts were: "It was proved by the admissions of the parties, by their attorneys, that L. P. Alford, and the defendant, by a union of the several possessions, had, next before the commencement of the plaintiff's action, peaceable, adverse, and uninterrupted possession, for more than three years, claiming under color of title, of 640 acres of land, by virtue of said Alford's head-right certificate, duly recommended, duly surveyed, and returned to the general land-office, and within the boundary of both of the one-league surveys of plaintiff, described and mentioned in the second and third count of his petition."

There was no room to argue, nor could the jury find, that any part of the three years' possession was held without color of title, for the contrary is expressly admitted. In reference to the particular facts of this case, the instruction was not erroneous in the particular complained of.

It is also urged that, in addition to what was said by the court, the jury should have been told that the defendant, having no title or color of title such as that prescribed by the statute, could
[*605] *not have the benefit of the bar, by virtue of the title or color of title of Alford, under whom he claimed; for the

reason that, claiming a bar under the statute, he had to show the circumstances prescribed by it; and the title prescribed having to be a transfer down to him in possession, the requirement was not complied with by showing a title in him under whom he claimed; and the consequence is, that the defendant, instead of proving himself within the rule required, shows himself out of it, and not entitled to the bar.

But upon the facts agreed, this position is not tenable. It was agreed that the defendant's possession was under color of title, by virtue of Alford's head-right certificate; and the instruction given by the court required the jury to find that the defendant claimed in privity with Alford; and this privity is also admitted, for he could be in under color of Alford's head-right only by force of a consecutive chain of transfer through Alford from the sovereignty of the soil.

He was, therefore, not setting up color of title in another, but in himself. It is true the record does not show how this privity was created, nor that the defendant was in a consecutive chain of transfer. But the necessity for this proof was done away by the admission of the plaintiff, that the defendant was in possession under color of title; for, as has just been observed, this was equivalent to an admission that he was in under such a chain of transfer from the sovereignty of the soil.

It has also been urged, that the 14th section of this statute allows an entry within ten years next after the right accrues. We are spared the necessity of discussing this question at large, because it has been distinctly decided by the supreme court of Texas, in *Horton v. Crawford*, 10 Texas, 382; and we concur entirely in the correctness of the reasoning by which it is there shown that the 14th section of the act has no effect upon the bar created by the 15th section.

The other matters assigned for error related exclusively to the plaintiff's title. But as the bar under the 15th section of the statute of limitations was complete and effectual upon the conceded facts, there can be no error in the judgment in favor of the defendant, even if the court ruled erroneously in respect to the title of the plaintiff; and we have not considered these alleged errors, and give no opinion thereon.

The judgment of the district court is affirmed, with costs.

Dennistoun v. Stewart. 17 H.

ALEXANDER DENNISTOUN, JOHN DENNISTOUN, WILLIAM CRAIG MYLNE, and WILLIAM WOOD, Partners, under the Style of A. DENNISTOUN AND COMPANY, Plaintiffs in Error, v. ROGER STEWART.

17 H. 606.

A mistake in the christian name of the acceptor, in a copy of a bill of exchange inserted in the protest, the other descriptive particulars being sufficient to identify the bill, does not vitiate the protest.

ERROR to the circuit court of the United States for the southern district of Alabama. The case is stated in the opinion of the court.

Phillips, for the plaintiffs.

No counsel *contra*.

GRIER, J., delivered the opinion of the court.

The plaintiffs declared against the defendant, as drawer of a bill of exchange, by the name and style of James Reid and Co., of which the following is a copy : —

“ Mobile, September 9, 1850.

“ No. —. £4,417 14s. 11d. st'g.

“ Sixty days after sight of this of first exchange, (second and third unpaid,) pay to the order of ourselves, in London, forty four hundred and seventeen pounds, 14s. 11d. st'g, value received, [* 607] * and charge the same to account of 1,058 bales cotton per ‘ Windsor Castle.’

“ Your obedient servants,

“ Pr. pro JAMES REID AND Co.,

“ WM. MOULT, JR.

“ To HY. GORE BOOTH, Esq., Liverpool.

“ *Acceptance across the face of the bill.*

“ *Seventh October, 1850.* Accepted for two thousand five hundred and seventy one pounds eighteen shillings and seven pence, being balance unaccepted for acpt. 1,058 bf. cotton, pr. Windsor Castle, payable at Glyn and Co.

“ Pr. pro HENRY GORE BOOTH,

“ AND. E. BYRNE.

“ Due 9 Decem.

“ Indorsed : —

“ Pay Messrs. A. Dennistoun and Co., or order,

“ Pr. pro JAMES REID AND Co.,

WM. MOULT, JR.”

After reading this bill, with its indorsement, the plaintiff offered in evidence a regular protest, indorsed on a copy of a bill agreeing in every particular with the above, except that for "And. E. Byrne" was written "Chas. Byrne."

The defendant objected to the reading of the protest in evidence, because it did not describe the bill of exchange produced by the plaintiffs, but a different bill. The court sustained this objection, and excluded the protest from the jury, which is the subject of the first bill of exceptions.

A protest is necessary by the custom of merchants in case of a foreign bill, in order to charge the drawer. It is defined to be in form "a solemn declaration written by the notary under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is, therefore, protested."

A copy of the bill, it is said, should be prefixed to all protests, with the indorsements transcribed *verbatim*. 1 Pardess. 444 ; Chitty on Bills, 458.

However stringent the law concerning mercantile paper, with regard to protest, demand, and notice, may appear, it is nevertheless founded on reason and the necessities of trade. It exacts nothing harsh, unjust, or unreasonable. A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and consequently may be amended according to the truth, if any mistake has been made.

* The copy of the bill is connected with the instrument [* 608] certifying the formal demand by the public officer, as the easiest and best mode of identifying it with the original. Mercantile paper is generally brief, and without the verbiage which extends and enlarges more formal legal instruments. Hence, it is much easier to give a literal copy of such bills, than to attempt to identify them by any abbreviation or description. The amount, the date, the parties, and the conditions of the bill, form the substance of every such instrument. Slight mistakes, or variances of letters, or even words, when the substance is retained, cannot and ought not to vitiate the protest. A lost bill may be protested, when the notary has been furnished with a sufficient description, as to date, amount, parties, &c., to identify it.

In indictments for forgery, it is not sufficient to state the "substance and effect" of the instrument; it must be laid according to the "tenor," or exact letter; but the law merchant demands no such stringency of construction. The sharp criticism indulged when the

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life of a prisoner is in jeopardy cannot be allowed for the purpose of eluding the payment of just debts.

It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers. The object of notice is to inform the party to whom it is sent that payment has been refused by the maker, and that he is held liable. Hence such a description of the note as will give sufficient information to identify it, is all that is necessary. What was said by Mr. Justice Story, in delivering the opinion of this court, in *Mills v. The Bank of the United States*, with regard to variances and mistakes in notices, will equally apply to protests: "It cannot be for a moment maintained that every variance, however immaterial, is fatal. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility."

In the case before us, the protest had an accurate copy of every material fact which could identify the bill — the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; in fine, every thing necessary to identify the bill. The only variance is a mistake in copying or deciphering the abbreviations and flourishes with which the christian name of the acceptor's agent is enveloped. The abbreviation of "And." has been mistaken for Chas., and the middle letter E. omitted. The omission of the middle letter would not vitiate a declaration or indictment. Nor could the mistake mislead any person as to the identity of the instrument described.

[* 609] * We are of opinion, therefore, that the objection made to this protest, "that it does not describe the bill of exchange produced, but a different bill," is not true in fact, and should have been overruled by the court.

This renders it unnecessary for us to notice the offer of testimony to prove the identity, which was also overruled by the court.

The judgment of the circuit court is reversed, and a *venire de novo* awarded.

Griffin v. Reynolds. 17 H.

JACK T. GRIFFIN AND WIFE, Plaintiffs in Error, v. JAMES Y. REYNOLDS.

17 H. 609.

In an action of covenant on a warranty of title to land, the record of a recovery had, in ejectment, against the plaintiff in the action of covenant, is admissible in evidence, though he was examined as a witness for the plaintiff in ejectment.

Where the covenantee had been evicted from part of the land, it is erroneous to instruct the jury to allow a like part of the purchase-money, as damages in an action of covenant; the value of that part of the land lost, taking the consideration paid as the value of the whole, and adding interest from the time of the loss, and expenses, would be the measure of damages.

A married woman is not liable to an action of covenant, though she join with her husband in warranting the land as to which she releases her claim to dower.

ERROR to the district *court of the United States for [* 610] the northern district of Mississippi. The case is stated in the opinion of the court.

Reverdy Johnson, Jr., and Reverdy Johnson, (with whom was Adams,) for the plaintiffs.

Lawrence, contra.

CAMPBELL, J., delivered the opinion of the court.

The defendant recovered a judgment in the district court, for damages sustained by the breach of a covenant of warranty of title to land in Alabama, contained in a conveyance of the plaintiff to him.

To establish the existence of an outstanding paramount title at the date of the conveyance, the defendant relied upon a judgment and execution in a suit in ejectment, commenced in Alabama, for the land, a few days after the date of the deed, to which the plaintiff (Griffin) was a defendant, and which resulted in a judgment against him, that was followed by a writ of possession, which is returned "executed." It appears, from the evidence, that the defendant was called by the plaintiff in the ejectment suit as a witness, though it is not clear to what fact in issue. Objection was made that the record of the suit could not be used under these circumstances. The district court admitted the record, but referred it to the jury to determine whether his testimony was material, and, if so, to disregard the evidence.

This ruling is assigned as error. There are authorities to the point that a record of a verdict and judgment cannot be used in favor of one who has contributed, by his evidence, to their recovery, 18 Johns. 351; 4 Day, 431; 2 Hill & Cow. notes 5; and one of the reasons assigned for confining the use of judgments to the parties and

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privies to them is, that a stranger may have produced them by his testimony. But the court is of opinion that this exception to the general rule, defining the parties by whom the evidence may be used, would introduce an inconvenient collateral inquiry, and that no practical evil will result from maintaining the general rule unimpaired; and that it is important that the rules of evidence should be broad and well defined.

The record in the present suit should have been admitted, without any reservation. *Blakemore v. Glamorganshire Canal Co.* 2 C. M. and R. 133.

There was some doubt upon the trial whether the issue of the defendant could be sustained by this evidence, and therefore he [* 611] attempted to prove the existence of a paramount title * in the lessors of the plaintiff in the ejectment suit. For this purpose he proved that the land had belonged to one Oliver, who, in 1838, conveyed it to trustees, to secure certain liabilities described in the deed, and that under this deed the property had been recovered; that the plaintiff's title came from Oliver, by sheriff's deeds, dated in 1841, and was inferior to that of the trustees. To prove the deed of trust, he introduced a copy from the records of the probate court in Alabama, where it had been recorded, but gave no evidence to account for the original.

At the date of the copy there was no law in Alabama which authorized the use of copies in place of, and without accounting for the original; and in relation to deeds of trust, the registry acts of that State merely required their registration for the purpose of giving notice, but did not assign any value to the record as evidence in courts, nor has any statute of Mississippi enlarged the operation of the statute of Alabama in that State. *Bradford v. Dawson*, 2 Ala. 203; 5 *ibid.* 297; 13 *ibid.* 370. We think that this copy should not have been admitted.

The deed from the plaintiff to the defendant, in which the warranty is contained, is an original and absolute deed, duly acknowledged and recorded; and the act which authorizes the acknowledgment, also provides that it shall be admitted as evidence in courts without further proof. *Clay's Dig.* 161, § 1; *Robertson v. Kennedy*, 1 Stew. 245.

We think that, under the decisions of this court, this deed was properly admitted. *Owings v. Hull*, 9 Pet. 607.

The court was requested by the plaintiffs "to instruct the jury that this is an action for damages, and that the plaintiff can only recover the value of the part lost, if a part only was lost at the time of the eviction, in proportion to the amount he paid," which charge was refused; and the jury was instructed "that if the plaintiff had not

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lost all the land conveyed to him by the defendant, then the jury might allow him the average value of the part lost, in proportion to the price paid for the whole. The charge given by the court is erroneous. The measure of damages is the loss actually sustained by the eviction from the land for which the title has failed, and that damage would not usually be ascertained by taking the average value, though the recovery could not exceed the consideration paid, interest, and expenses of suit. The joinder of the wife with the husband, in this action, is also assigned for error. The statutes of Alabama authorize the wife to bar her claim to dower by such a conveyance as this, but do not enlarge her power to enter into personal engagements or to incur responsibilities for the title. *George v. Gooldsby*, 23 Ala. 327; *Hughes v. Williamson*, 21 *ibid.* 296.

* There is a misjoinder of parties. But this objection is [* 612] taken here, for the first time; and the difficulty may be obviated by a *nolle prosequi* in the district court, which is allowable under the decisions of this court. *Minor v. Bank of Alexandria*, 1 Pet. 46; *United States v. Leffler*, 11 *ibid.* 86; *Amis v. Smith*, 16 *ibid.* 303.

Judgment reversed and cause remanded.

WILLIAM JUDSON, Appellant, v. WILLIAM W. CORCORAN.

17 H. 612.

Though the award of commissioners under the act of March 3, 1849, (9 Stats at Large, 393,) passed to carry into effect the convention between the United States and Mexico, does not finally settle the equitable rights of third persons to the money awarded, yet it makes a legal title to the person recognized by the award as the owner of the claim; and if he also has equal equity, his legal title cannot be disturbed.

Though the first purchaser of a *chose in action*, generally, has the better right, he may lose his preference by laches, as, under the circumstances of this case, he was held to have done.

APPEAL from the circuit court for the District of Columbia. The case is stated in the opinion of the court.

Lawrence and Coxe, for the appellant.

Bradley and Carlisle, contra.

CATRON, J., delivered the opinion of the court.

Judson brought this suit in equity, to recover \$6,000 from William W. Corcoran, in whose favor a decree had been made for about \$15,000, by the board of commissioners acting according to the 15th article of our treaty with Mexico of 1848.¹

¹ 9 Stats. at Large, 922.

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Corcoran claimed, as assignee, under Bradford B. Williams [* 613] * and Joseph H. Lord, who were owners of the cargo of the ship Henry Thompson, and which was unlawfully seized and confiscated by the authorities of Mexico.

The claim having been presented to the mixed commission under the convention between the United States and Mexico, of April, 1839,¹ the American members of that board made a report in favor of the claim ; but the Mexican commissioners not concurring in the opinion of their colleagues, the case was referred to the umpire, and was returned by him without a decision. It therefore constituted one of that class of cases embraced in the 5th article of the unratified convention of the 20th November, 1843, and which is referred to and incorporated into the 15th article of the treaty of peace of Guadalupe Hidalgo ; and having been modified in some of its provisions, the ratifications were exchanged on 30th May, 1848.

On the 3d March, 1849, an act of congress was passed to carry some of the provisions of this treaty into effect. Among other things, it provided for the establishment of a board of commissioners, "whose duty it shall be to receive and examine all claims of citizens of the United States upon the republic of Mexico, which are provided for by the treaty, and to decide thereon according to the provisions of the treaty."

On the 11th of June, 1845, Bradford B. Williams assigned one half of his interest in the claim in dispute to E. H. Warner. August 15, 1845, Warner assigned the same interest to William B. Hart. October 15, 1846, Williams assigned to Hart the residue of his interest. October 3, 1846, Joseph H. Lord assigned to Hart all his interest in the claim. June 18, 1847, Hart assigned the whole claim to William W. Corcoran.

"By these several assignments, (says the late board,) the whole became vested in the said William W. Corcoran, and the award was therefore made in his favor."

On the first day of January, 1845, Bradford B. Williams had assigned to William Judson, the complainant, an interest of \$6,000, of the amount of the suspended claim pronounced valid by our commissioners, in 1842, with interest from the date of the assignment.

From January, 1845, to June, 1847, about two years and a half, Judson held his assignment without filing any notice of its existence at the department of state, so that others might have notice of his interest, nor did he set up any pretension until the assignee, Corcoran, had prosecuted the claim to a final award, and was adjudged

¹ 8 Stats. at Large, 527.

by the board of commissioners to be the legal owner of the amount awarded; and as legal owner Corcoran is sued.

In regard to the preliminary questions raised at the bar, it * may be remarked that we have no doubt the district [* 614] court had authority to hear and determine the equities of the parties, notwithstanding the judgment in Corcoran's favor by the board of commissioners. The question that an award like the present is not conclusive among adverse claimants, was settled in the case of *Comegys v. Vasse*, 1 Pet. 193, in 1828, and has not since been open.

And as respects the validity of assignments of claims like the one here presented, no question can be raised at this day, as such assignments have been recognized by the various boards of commissioners and the courts of justice for many years. The case of *Comegys v. Vasse*, also adjudged this point.

The contest here depends on the merits. Judson had the earliest assignment of part of the amount declared to be due to Williams, by the two United States commissioners, in 1842, to the extent of \$6,000, and the claim assigned being a right depending on an equity against the government of Mexico, and assuming that both sets of assignments are alike fair, and originally stood on the same *bonâ fide* footing, the rule of necessity is, that the assignor having parted with his interest by the first assignment, the second assignee could take nothing; and, as he represents his assignor, is bound by the equities imposed on the latter; 1 White and Tudor's Eq. Ca. 236; and hence has arisen the maxim in such cases, that he who is first in time is best in right. But this general rule has exceptions, and the case before us was obviously decided in the court below on an exception to the general rule.

Judson took his assignment in January, 1845, which he first produced in May, 1851, when this bill was filed. In the mean time Corcoran had got his assignment, and immediately gave written notice of it to the department of state, and August 17, 1847, received an answer from the secretary, recognizing the fact of notice having been received, and that it was filed with the documents of the postponed claim of Williams and Lord, appertaining to the unfinished award.

Corcoran's assignment was fair, and accepted on his part without knowledge of Judson's; nor is the contrary alleged in the bill. And assuming Judson's to be fair also, and that no negligence could be imputed to him, then the case is one where an equity was successively assigned in a *chose in action* to two innocent persons, whose equities are equal, according to the moral rule governing a court of

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chancery. Here, Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect.

Now nothing is better settled than that this cannot be done. The equities being equal, the law must prevail.

[* 615] There are other objections to the case made by the appellant, growing out of negligence on his part in not presenting his assignment and claim of property to the state department, so as to notify others of the fact. The assignment was held up and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect on Corcoran, were priority accorded to it by our decree. It is certainly true, as a general rule, as above stated, that a purchaser of a *chose in action*, or of an equitable title, must abide by the case of the person from whom he buys, and will only be entitled to the remedies of the seller; and yet, there may be cases in which a purchaser, by sustaining the character of a *bonâ fide* assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, (as in this instance,) would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy.

The cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, 3 Russell's R. 1, 60, established the doctrine to the foregoing effect in England; they were followed in the case of *Mangles v. Dixon*, *McNaughten and Gordon's* R. 437. And the same principle of protecting subsequent *bonâ fide* purchasers of *choses in action*, &c., against latent outstanding equities, of which they had no notice, was maintained in this court in the case of *Bayley v. Greenleaf*, 7 Wheat. 46. That was an outstanding vendor's lien, set up to defeat a deed made to trustees for the benefit of the vendees' creditors. The court held it to be a secret trust; and although to be preferred to any other subsequent equity unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal title, still, it must be postponed to a subsequent equal equity connected with such advantage.

The rule was distinctly asserted by Chancellor Kent, in 1817, in *Murray v. Lylburn*, 2 Johns. C. C. 442, before the question was settled in England, and before this court discussed it, which was in 1822. And the same principle was applied by the court of appeals of Virginia, in the case of *Moore v. Holcombe*, 3 Leigh's R. 597, in 1832.

Secondly. There is no satisfactory evidence, as we apprehend, to establish the fact that a sufficient consideration was paid by Judson

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to Williams for the assignment on which the bill is founded, to authorize Judson to set it up, and thereby to postpone Corcoran, who paid a full price, as did those under whom he claims; yet as these objections depend on facts peculiar to this cause, we deem it useless to critically investigate them, as the decree below dismissing the bill was clearly proper, on the first and merely legal ground.

* It is ordered that the decree be affirmed.

[* 616]

1 Wal. 604.

MARY LEWIS, Administratrix of STEPHEN J. LEWIS, deceased, Appellant, v. EDWARD R. BELL, Assignee of L. BELL, JUNIOR.

17 H. 616.

An assignment of a *chose in action*, by a father to his son, is not subject to the objection of champerty.

An assignment of a *chose in action* "in consideration of one dollar, and divers other good considerations," when attempted to be impeached by the representative of the assignor, may be supported by evidence of valuable and adequate consideration.

APPEAL from the circuit court for the District of Columbia. The case is stated in the opinion of the court.

Chilton and Lawrence, for the plaintiff.

Bradley, contra.

GRIER, J., delivered the opinion of the court.

The subject-matter in dispute in this case is a sum of money in the hands of the secretary of the treasury, which had been awarded to the appellant by the commissioner appointed under the act of congress¹ to adjust claims under the treaty² between the United States and Brazil. Stephen J. Lewis, deceased, is admitted to have been the original owner of the claim. He was owner of one fifth of the brig Caspian, which was illegally seized by the Brazilian squadron, in October, 1827, and condemned. Lewis was on board at the time, and was robbed of his baggage and money to the extent of some four thousand dollars. The whole amount awarded on these claims of Lewis, was \$11,551.

Isaac Bell, senior, the father of the appellee, had an assignment of this claim from Lewis, by deed of assignment, dated November, 1828.

The claim was prosecuted to its final recovery in 1852, by Isaac Bell. But having in the meanwhile lost or mislaid his original

¹ 9 Stats. at Large, 422, 606.

² Ibid. 971.

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[* 617] * deed of assignment, and not having sufficient legal proof of the copy, the commissioner awarded the money to the administratrix of Lewis.

Isaac Bell, Senior assigned his right to his son, Isaac Bell, Jr., and he soon after assigned to his brother, the appellee, who instituted this proceeding in the circuit court of the District of Columbia under the provisions of the act of congress of July 3, 1852.¹

After the institution of this suit, the original assignment was accidentally discovered, and has been satisfactorily proven. The court below awarded the money to the complainant below, and the administratrix of Lewis has taken this appeal.

The objections to the title of Edward R. Bell, as champertous, collusive, and fraudulent, and made for the purpose of using the father as a witness, are wholly unsustained by any evidence.

There is no principle in equity which prevents a creditor from assigning an interest in a debt, after institution of a suit therefor, as being within the statutes against champerty and maintenance; see 2 Story's Eq. 1049, 1054; nor will the want of a full money consideration, as between father and son, and brother and brother, subject the transaction to such imputation, without further proof. The father's testimony was not offered by the appellee in this case; we are not, therefore, bound to notice the question of its admissibility, or the policy of permitting assignments for the purpose of making the assignor a witness, on which so much of the argument of this case was expended.

It is contended, also, that the assignment of Lewis to Bell, senior, is not absolute, but a security only, of some debt which has been satisfied; and that it is voluntary, and imports a trust between the parties.

The deed of assignment, after a recital of the capture of the brig Caspian, and the claim preferred by the American minister at Brazil, on behalf of Lewis, for indemnity, proceeds as follows:—

“ Now, know all men by these presents, that the said Stephen J. Lewis, for and in consideration of the sum of one dollar, lawful money of the United States, to him in hand paid by Isaac Bell, of the city of New York, merchant, the receipt whereof is hereby acknowledged, and also for divers other good considerations him thereunto moving, hath granted, bargained, and sold, assigned, transferred, and set over, and by these presents doth grant, bargain, and sell, assign, transfer and set over, unto the said Isaac Bell, his executors, administrators, and assigns, all and singular, the said claim, and all

¹ 10 Stats. at Large, 11.

the sum and sums of money that may be recovered or received, of and from the said Brazilian government, or of and from whomsoever it may concern, for or by reason of the said illegal capture, or which may arise from *the proceeds of the said brig [* 618] Caspian and cargo; to have and to hold the same and every part and parcel thereof, unto him, the said Isaac Bell, his executors, administrators, and assigns, forever," &c., &c.

This is an absolute assignment of the whole claim of Lewis against the Brazilian government. Besides the consideration of one dollar, it mentions "divers other good considerations," without specifying them particularly.

The bill alleges that the real consideration was a large indebtedness of Lewis to Bell, which was never paid, Lewis having died in 1844, insolvent. This is denied by the answer. But the evidence, as far as it affects the point, tends to establish the correctness of the allegations of the bill. After the assignment, Lewis does not appear to have interfered in the prosecution of this claim, up to the time of his death, in 1844, nor did his administratrix set up a claim till the money was recovered, in 1852.

In December, 1828, it appears that Bell transmitted this assignment to his agent in Buenos Ayres, in order to prosecute the claim, alleging that the "assignment was made by Lewis, in consequence of advances made to him in the purchase of a brig and cargo." In the same year, he wrote to the Hon. Henry Clay, inclosing the protest of Lewis, in order that our government might be led to urge the payment of his claim, and alleging as the reason of his interference, that Lewis was indebted to him in the sum of \$15,000, and had failed, and had therefore made him the assignment now in question. In a letter from Bell to Mr. Cambreling, in 1830, urging his interference in behalf of the Lewis claim, Bell assigns as the reason for his request, that Lewis had become indebted to him, and had no other means of payment but through that claim; and to confirm the whole matter beyond dispute, the counsel of the respondent below (now appellant) read in evidence the testimony of Isaac Bell, senior, proving the assignment to have been made in consideration of large indebtedness by Lewis to Bell, and that Lewis was then insolvent, and continued so to the time of his death. By their own showing, therefore, there is ample consideration for the assignment, and not the least evidence of a secret trust.

The decree of the circuit court is, therefore, affirmed.

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ABATEMENT.

1. Upon the death of a complainant in equity, only his legal representatives can revive the suit. An assignee cannot appear. *Barribeau v. Brant*, 17 H. 43....354.
2. Under the 61st rule of this court, where the representatives of a deceased complainant and appellant did not appear after the lapse of two whole terms succeeding the suggestion of his death, the suit was entered as abated. *Ib.*

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1. An action of debt lies in the circuit court for Maryland, founded on a decree for the payment of money made by a court of equity, of general jurisdiction, in the State of New York. *Pennington v. Gibson*, 16 H. 65....80.
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1. When a debtor deposited with an attorney certain notes as security for claims against him, then in the attorney's hands, and subsequently gave verbal directions to the attorney to protect another creditor out of any balance which might remain, and the attorney gave to this last-mentioned creditor the control of a judgment recovered on one of the notes; *held*, that the creditor acquired an equitable interest in the judgment, by the direction of the debtor to the attorney, and the action of the latter thereon. *Hinkle v. Wanzer*, 17 H. 353....544.
2. Though the first purchaser of a *chose in action*, generally, has the better right, he may lose his preference by laches, as, under the circumstances of this case, he was held to have done. *Judson v. Corcoran*, 17 H. 612....727.
3. An assignment of a *chose in action*, by a father to his son, is not subject to the objection of champerty. *Lewis v. Bell*, 17 H. 616....731.
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1. Where a bankrupt, having a valid claim for a large sum, on the government of Mexico for the seizure of a vessel and cargo, was making efforts to obtain its allowance and payment before and after his bankruptcy, but gave no information concerning it to his assignee, and inserted in his schedule no allusion to it except "Mexican Republic subject to a mortgage." *Held*, that a purchase by him of all his effects for a nominal sum, from his assignee, in the name of a third person, at an auction sale held under an order of the court in bankruptcy, was fraudulent and void. *Clark v. Clark*, 17 H. 315....520.
2. The assignee being dead and no other appointed, *held*, that a bill by a creditor in behalf of himself and all other creditors, to which the new assignee, when appointed, made himself a party, filed within the time required by the eighth section of the act of March 3, 1849, (9 Stats. at Large, 394,) was in compliance with that act, and the circuit court for the District of Columbia could adjudicate on the title to the fund. *Ib.*
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2. Though it is a rule that a sailing vessel should keep her course when approaching a steamer, and it is the duty of the latter to keep out of her way, yet this does not apply to a case where the steamer was not in fault for not seeing the sailing vessel till they were too near to allow the steamer to change her course; in such a case, the steamer having stopped, as soon as the sailing vessel was discovered, and being in the act of backing when the collision occurred, was held to be in no fault. *Peck v. Sanderson*, 17 H. 178. . . .439.
3. A vessel closehauled, meeting one having the wind free, luffed; *held* to be in fault for not keeping her course. *Schooner Catharine v. Dickinson*, 17 H. 170. . . .434.
4. It is not an excuse for want of a proper look-out in the night, in a place much frequented by vessels, that all hands were employed in reefing, there being no unusual emergency. *Ib.*
5. It is not a defence to a cause of collision that the libellants have been paid a total loss by underwriters. *Propellor Monticello v. Mollison*, 17 H. 152. . . .423.
6. If the respondent makes satisfaction to the injured party, he cannot be compelled to answer again to a merely equitable owner of the claim, who must protect his own rights by intervening in the cause, either before a decree, and becoming *dominus litis*, or after the decree, while the money is in the registry. *Ib.*
7. If both vessels are in fault, the loss by collision is to be divided. *Schooner Catharine v. Dickinson*, 17 H. 170. . . .434.
8. When a vessel, injured by collision, is run on to a beach, bilged, and afterwards raised and repaired, the measure of damage is the cost of raising and restoring her to as good a condition as she was in at the time of the injury; in such a case, the owner cannot sell her, as she lies, deduct the price from the value before the collision, and recover the difference. *Ib.*

COMMON CARRIER

SHIPS, &c. 1-3.

CONDITION.

PUBLIC LANDS, 16.

CONFLICT OF LAWS.

RECEIVER.

CONSIGNOR AND CONSIGNEE.

SHIPS, &c. 1.

CONSTITUTIONAL LAW.

1. The legislature of a State, if not restrained by its constitution, may make a valid and binding contract with a banking corporation, in its charter, that no more than a specified amount of taxes shall be levied on its property during a term of years; and a succeeding legislature has not power to pass a law impairing the obligation of such contract. *State Bank of Ohio v. Knoop*, 16 H. 369....190.
2. Upon the construction of a banking law of Ohio, involved in this case, *held*, that it was not merely declaratory of the intentions of the legislature, but amounted to a contract. *Ib.*
3. The principles involved in the preceding decision (*State Bank of Ohio v. Knoop*, 16 H. 369,) further explained, and applied to this case; but the legislation of Ohio, respecting the taxation of the plaintiffs, *held* not to amount to a contract, the obligation of which had been impaired. *Ohio Life Insurance and Trust Company v. Debolt*, 16 H. 416....230.
4. An act of the legislature of Tennessee, providing that where a deed had been *de facto* registered for more than twenty years, it should be deemed and taken to have been lawfully registered, though operating in respect to deeds registered before, and offered in evidence after its passage, is not a retrospective law, within the meaning of the constitution of that State. *Webb v. Den*, 17 H. 576....694.
5. A law of Pennsylvania, passed after the death of one of its citizens, the effect of which is to compel his executors to pay from property in their hands to be administered in Pennsylvania, a tax on property out of that State, bequeathed to citizens of other States, is not an *ex post facto* law, within the meaning of the constitution of the United States. *Carpenter v. Pennsylvania*, 17 H. 456....610.

COURTS OF THE UNITED STATES, 1-3; FERRY; MANDAMUS, 2; UNITED STATES.

CONTRACT.

1. All contracts for a contingent compensation for obtaining legislation, or to use personal, or any secret, or sinister influence on legislators, are void. *Marshall v. Baltimore and Ohio Railroad Company*, 16 H. 314....153.
2. Secrecy, as to the character under which the agent or solicitor acts, tends to deception, and is immoral and fraudulent; and where the agent contracts to use such secrecy, or voluntarily does use it, he cannot have the aid of a court to recover compensation. *Ib.*
3. Though a collateral contract, made in aid of one tainted by illegality, cannot be enforced, yet a *bonâ fide* purchaser, for value of an illegal claim, who has received the proceeds thereof, cannot be compelled by the assignor's representatives or creditors, to account therefor; and if the claim was legalized before the proceeds were received, the assignee may rely on his assignment as valid. *McBlair v. Gibbes*, 17 H. 232....473.
4. Distinction between contracts tainted with illegality, and those collateral thereto and not affected by the taint. *Ib.*

CONSTITUTIONAL LAW, 1-3; CORPORATION; COURTS OF THE UNITED STATES, 1-3; EQUITY, 12; EXECUTION, 1; FERRY; GUARDIAN AND WARD; LAW AND FACT.

COPYRIGHT.

EQUITY, 6. 7.

CORPORATION.

Though a city council, when acting in its legislative capacity, acts by ordinance, they

may license a ferry by contract in writing, signed by the mayor. *Fanning v. Gre-
goire*, 16 H. 524. . . . 284.

CONSTITUTIONAL LAW, 1-3; COURTS OF THE UNITED STATES, 6. 7; STATUTES.

COSTS.

1. Nothing having been done by the court below after a mandate but to tax the costs, and they being less than \$2,000, no writ of error lies. *Sizer v. Many*, 16 H. 98. . . . 41.
2. Under the 17th section of the patent act of July 4, 1836, (5 Stats. at Large, 124,) a writ of error cannot be allowed merely to review a question of costs in a patent case. *Ib.*
3. Where a judgment is entered up, and a blank left for the amount of costs, it is proper for the court, at a subsequent term, to have the costs taxed and the blank filled *nunc pro tunc*. *Ib.*

COURTS OF THE UNITED STATES.

1. The question whether a person, appointed a trustee of a banking corporation, under the authority of a statute of a State, has power to sue on a note held by the bank, after he has collected enough to pay its debts, cannot be brought to this court under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85.) *Robertson v. Coulter*, 16 H. 106. . . . 45.
2. When a case is brought here under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85,) upon the ground that a law of a State impairs the obligation of a contract, this court must determine whether a contract exists, and what are its constructions and obligations. *State Bank of Ohio v. Knoop*, 16 H. 369. . . . 190.
3. In construing the constitution of a State, this court will adopt a settled construction, existing when the contract in question was made, acquiesced in by all the branches of the government, and under the authority of which the contract was entered into, and reject a more recent decision by the highest court of the State, as not affording the rule for such a case. *Ib.*
4. This court cannot rest its judgment upon an opinion of a state court, concerning the construction of a statute of the State, if it was not necessary to construe the statute in order to decide the case in which the opinion was pronounced. Under such circumstances, this court must examine the question of construction, and decide it, as seems to them right. *Carroll v. Carroll's Lessee*, 16 H. 275. . . . 128.
5. The courts of the United States can and should take notice of the laws and judicial decisions of the several States of the Union, and with respect to them, no averment need be made in pleading, which would not be necessary within the respective States. *Pennington v. Gibson*, 16 H. 65. . . . 30.
6. The jurisdiction of the circuit courts of the United States where a corporation is a party, reëxamined and held to attach, where the averment on the record shows that a citizen of one State sues a corporation, created by the legislature of another State. *Marshall v. Baltimore and Ohio Railroad Company*, 16 H. 314. . . . 153.
7. An averment that the plaintiff is an alien, and the defendants "The Pennsylvania Railroad Company," without saying whether a corporation or not, will not support the jurisdiction. *Piquignot v. Pennsylvania Railroad Company*, 16 H. 104. . . . 44.
8. If the record contain proper averments of citizenship to give the circuit court jurisdiction, they can be traversed only by a plea to the jurisdiction. *Wickliffe v. Owings*, 17 H. 47. . . . 357.
9. To support an action of replevin to recover bank bills, it is not necessary to show that the plaintiffs assignor could have sued, though the title to the bills was conveyed

to the plaintiff after they were taken and while they were detained by the defendant. *Deshler v. Dodge*, 16 H. 622....321.

10. The 11th section of the judiciary act of 1789, (1 Stats. at Large, 78,) does not apply to an action to recover the note itself, but to an action to recover its contents. *Ib.*
11. A decree that the respondent, as administrator, is accountable to the representatives of the deceased for upwards of \$2,000, may be appealed from by him, though the same decree apportions the amount among the complainants, and the distributive share of each is less than \$2,000. *Shields v. Thomas*, 17 H. 3....335.
12. An appellant cannot sustain his appeal upon the ground that, if interest were added to the balance of account claimed in the libel, more than \$2,000 was in dispute, at the time of the decree in the circuit court, unless his libel claims interest. *Udall v. Steamship Ohio*, 17 H. 17....344.
13. This court will not allow the libel to be amended here, by the insertion of a claim of interest, so as to support the jurisdiction. *Ib.*
14. The next preceding decision applied to this case. *Olney v. Steamship Falcon*, 17 H. 19....346.
15. A claim in a libel of "\$1,800 and upwards," will not support an appeal. *Ib.*
16. The record of the district court for the northern district of California, in a proceeding to confirm a Mexican title, did not show that the land lay in that district. The case was remanded. *Cervantes v. United States*, 16 H. 619....321.
17. The 12th section of the act of August 31, 1852, (10 Stats. at Large, 99,) dispenses with the requirements of the 9th section of the act of March 3, 1851, (9 Stats. at Large, 631,) respecting the mode of proceeding in the district court of California, when either party is dissatisfied with the award of the commissioners concerning titles to land in that State. And the provisions of the law of 1852, concerning pleadings and notice, are not so defective as to be invalid. *United States v. Ritchie*, 17 H. 525... 656.
18. Though the act of 1851 terms the proceeding in the district court an appeal, and, inasmuch as the commissioners cannot exercise any part of the judicial power under the constitution, there can be no appeal, strictly speaking, from their decision; yet, the proceeding in the district court may be and is considered by this court to be an original proceeding there with a right of appeal to this court. *Ib.*
19. The district court of the United States in Mississippi, has not jurisdiction to entertain a bill to compel parties to interplead, who are not found within the district, and on whom no personal service was made. *Herndon v. Ridgway*, 17 H. 424.... 588.

COSTS; EQUITY, 10-16; LIEN; MANDAMUS; PARTIES; PUBLIC LANDS, 9. 10;
UNITED STATES; WRIT OF ERROR; WRIT OF RIGHT.

COVENANT.

1. A covenant with several lessors, to keep the demised premises in repair, is joint, though the lease sets out the proportions in which the lessors own, and reserves the rent to them, severally, in those proportions. *Calvert v. Bradley*, 16 H. 580....305.
2. The question, whether a mortgagee of a leasehold interest is liable on the covenants in the lease, as an assignee, considered. *Ib.*

DAMAGES, 1; EVIDENCE, 1; HUSBAND AND WIFE.

CREDITORS' BILL.

RECEIVER.

CRIMINAL LAW.

What, in the technical language of politicians, is denominated "log rolling," is a misdemeanor at common law, punishable by indictment. *Marshall v. Baltimore and Ohio Railroad Company*, 16 H. 314....153.

DAMAGES.

1. Where the covenantee had been evicted from part of the land, it is erroneous to instruct the jury to allow a like part of the purchase-money, as damages in an action of covenant; the value of that part of the land lost, taking the consideration paid as the value of the whole, and adding interest from the time of the loss, and expenses, would be the measure of damages. *Griffin v. Reynolds*, 17 H. 609.. 725.
2. Actual damages are to be found by a jury in a patent cause. *Seymour v. McCormick*, 16 H. 480....267.
3. What they are, cannot be determined by any one precise rule of law, applicable to all cases. *Ib.*
4. If the patentee finds it for his interest to retain the entire monopoly, the profits realized by the infringer may afford a rule. *Ib.*
5. If he habitually sells licenses, the price of a license may afford the proper measure. *Ib.*
6. To instruct that the measure of damages is the same, whether the patent covers an entire machine or an improvement on it, is erroneous. *Ib.*
7. There is no legal presumption binding on a jury, that third persons would have purchased of the patentee what they bought of the infringer, if the latter had not made and sold the thing patented. *Ib.*

COLLISION, 7. 8.

DEATH.

ABATEMENT; CONSTITUTIONAL LAW, 5.

DEBT.

ACTION, 1.

DECEIT.

The defendant having written a letter to his agent, headed "confidential," and the agent having shown it to the plaintiffs, in an action for a false representation made by the letter, it was held to be a question for the jury whether the defendant intended his agent should exhibit the letter. *Iasigi v. Brown*, 17 H. 183....444.

ACTION, 3.

DEDICATION.

SEA, 2.

DEED.

1. An executed marriage settlement must be expounded upon principles applicable to other deeds. *Adams v. Law*, 17 H. 417....584.
2. The purpose of a marriage settlement being, to provide a jointure, and not to make

a settlement on the issue of the marriage, a limitation was made to the children of the marriage, contingent upon the event that the wife should depart this life in the lifetime of the husband, leaving issue of the said marriage, one or more children then living; held that the word issue as explained by the subsequent words, did not include grandchildren. *Ib.*

3. Construction of a grant of water of a spring. *Irwin v. United States*, 16 H. 513.... 281.
4. The practical construction put on the grant by the grantees, continued through sixteen years, held to be evidence of what was intended to be conveyed. *Ib.*
5. A conveyance of a naked legal title to the equitable owners of the land, under no other description of the grantees than "the legatees and devisees of the late A. B." passes the title to the persons named in the will of A. B. as his legatees and devisees. *Webb v. Den*, 17 H. 576....694.

CONSTITUTIONAL LAW, 4; FRAUD.

DEVISE AND LEGACY.

1. A testator empowered his executors, after the death of his wife, to distribute the residue of his estate among such charitable institutions of South Carolina and Pennsylvania as they might deem most beneficial to mankind; the wife survived the executors; *held*, that even if such a power, confided to these particular persons by the testator, could be executed in England by the chancellor, it could not be by any court of the United States, and that this court could not take this residue from the next of kin. *Fontain v. Ravenel*, 17 H. 369....555.
2. Whether a legacy is chargeable on real estate depends on the will of the testator, and if he has blended his realty and personalty into one fund, for this purpose, it is not necessary first to exhaust the personalty before resorting to the realty. *Lewis v. Darling*, 16 H. 1....1.

JUDGMENT, &c. 3; PARTIES; WILL.

EJECTMENT.

PUBLIC LANDS, 11.

ELECTION.

GUARDIAN AND WARD.

EQUITY.

1. Though a court of equity cannot act directly on land not within its jurisdiction, it may compel the holder of the title, who is a party before it, to give effect to a lien. *Lewis v. Darling*, 16 H. 1....1.
2. Bill to establish the possession and quiet the title of the complainant to lands in Kentucky, sustained. *Wickliffe v. Owings*, 17 H. 47....357.
3. The statute in Kentucky upon the subject of this remedy, is not without influence upon the question of the propriety of this exertion of an established chancery power. *Ib.*
4. A court of equity does not interfere with judgments at law, unless the complainant had an equitable defence, of which he could not avail himself at law, because it did not amount to a legal defence, or had a good defence at law, which he was prevented from availing himself of by fraud, or accident, unmixed with negligence of himself or his agents. *Hendrickson v. Hinckley*, 17 H. 443....601.
5. A court of equity will not interfere to enforce a set-off, if the complainant could have made it in an action at law, and voluntarily waived it there. *Ib.*

6. A court of equity cannot make a decree for the penalties incurred for violation of copyright. *Stevens v. Gladding*, 17 H. 447....604.
7. But may decree an account of profits under the prayer for general relief. *Ib.*
8. A vendee of personal property may be relieved in equity from the payment of a just proportion of the purchase-money, if the vendor, who warranted the title, has died insolvent, and under a decree of a court of equity the purchaser has been obliged to pay a sum of money to extinguish a paramount title to a part of the property. *Wanzer v. Truly*, 17 H. 584....701.
9. A judgment against the vendee, for the entire purchase-money, in a suit against him as the garnishee of the vendor, does not deprive the vendee of his title to such relief; as between him and the judgment creditor, the vendee has the better equity. *Ib.*
10. A bill which states that the complainant had an interest in the subject-matter of a former suit in equity, applied to be admitted a party, was refused, and a decree made in fraud of his rights, and praying to have that decree set aside, &c., is an original bill, and not a bill of review, and the complainant must be competent to sue all the defendants. *Wickliffe v. Eve*, 17 H. 468....616.
11. Rules respecting the joinder and dispensing with parties to suits in equity in the courts of the United States. *Shields v. Barrow*, 17 H. 130....409.
12. A contract cannot be rescinded by a decree, without having before the court all the parties whose rights will be affected thereby; and an entire contract of compromise cannot be rescinded in part, and left to stand as to the residue. *Ib.*
13. The act of February 28, 1839, (5 Stats. at Large, 821,) relates solely to the non-joinder of persons out of the reach of process. *Ib.*
14. The 47th rule for equity practice is only a declaration of the effect of previous decisions of this court, and does not enable a circuit court to make a decree which must affect the rights of absent persons. *Ib.*
15. A circuit court cannot force defendants in an equity suit to file a cross-bill, and bring in new parties, whom those defendants are, but the complainants are not, competent to sue in the courts of the United States. *Ib.*
16. New parties cannot be introduced into a cause by a cross-bill. *Ib.*
17. Though a bill may be framed with a double aspect, the alternative case must be the foundation for the same relief. *Ib.*
18. Under the privilege of amending, the court should not allow a new and wholly different case to be made. *Ib.*

ABATEMENT; ACTION, 1; APPEAL, 1; ARBITRATION; DEVISE, &c. 1; METHODIST EPISCOPAL CHURCH; PARTITION; RECEIVER; SPECIFIC PERFORMANCE; SUPERSEDEAS; TRUST.

ESTOPPEL.

BOND, 2; JUDGMENT, 3.

EVIDENCE.

1. In an action of covenant on a warranty of title to land, the record of a recovery had in ejectment, against the defendant in the action of covenant, is admissible in evidence in favor of the plaintiff in that action, though he was examined as a witness for the plaintiff in ejectment. *Griffin v. Reynolds*, 17 H. 609....725.
2. Contradictory statements by a witness cannot be given in evidence to impeach him, unless he has been asked whether he made such statements to the persons to whom it is attempted to be shown he did make them; and this rule applies where the witness testifies by deposition, and the contradiction was by a letter. *Conrad v. Griffey*, 16 H. 38....23.
3. Under the act of March 3, 1797, § 2, (1 Stats. at Large, 512,) a treasury transcript

of an account of an Indian agent, adjusted and certified by the proper officers, is evidence, as against him and his sureties, that he received the several sums of money therein charged to him as received in the regular and usual course of the business of the department, without the production of copies of his receipts therefor. *Bruce v. United States*, 17 H. 437. . . . 596.

4. It is to be presumed that an invoice accompanied a consignment of merchandise to a foreign country. *Turner v. Yates*, 16 H. 14. . . . 11.
 5. A commercial correspondence, though between third persons, is often evidence of the nature of their transactions, and the relations they sustained to each other. *Ib.*
- ASSIGNMENT, 4; BILL OF REVIEW, 1. 2; BOND, 1; COURTS OF THE UNITED STATES, 5; DAMAGES, 7; DEED, 4; EXCEPTIONS, 3. 4; JUDGMENT, &c. 4; MASTER AND SERVANT, 4; PUBLIC LANDS, 7; SEA, 2; WRIT OF ERROR, 3.

EXCEPTIONS.

1. The record must show that an exception was taken at the stage of the trial when its cause arose, but the time and manner of placing the exception on the record may be regulated by the practice of the courts below. *Turner v. Yates*, 16 H. 14. . . . 11.
2. A rule of the circuit court for Maryland, on this subject held unobjectionable. *Ib.*
3. Though it has been held, (9 Pet. 182,) that the admission of evidence, where the judge tries both law and fact, is not a subject of a bill of exceptions, this is not true of the rejection of evidence. *Arthurs v. Hart*, 17 H. 6. . . . 338.
4. In such a mode of trial, the counsel should present the legal propositions on which he relies, and the court should place on the record its rulings thereon. *Ib.*

EXECUTION.

1. Construction of an agreement to accept satisfaction of a judgment, held to be conditional, and as it was not performed, the right to an execution revived. *Early v. Rogers*, 16 H. 599. . . . 314.
2. Whether a court will quash an execution, on account of proceedings against the debtor as the garnishee of the creditor, is a question appealing to the discretion of the court below, and a court of errors cannot revise its decision thereon. *Ib.*

LIEN; SHERIFF; SUPERSEDEAS.

EXECUTORS AND ADMINISTRATORS.

CONSTITUTIONAL LAW, 5; COURTS OF THE UNITED STATES, 11; TRUST, 1.

FALSE REPRESENTATIONS.

ACTION, 3; DECEIT.

FERRY.

A stipulation, by the legislature, that no court shall authorize another ferry, does not prevent the power to license another from being conferred on the government of a city, by a subsequent act of the legislature. *Fanning v. Gregoire*, 16 H. 524. . . . 284.

CORPORATION.

FISHERIES.

The 7th section of the act of July 29, 1813, (3 Stats. at Large, 49,) requires an oath to the verity of the fishing agreement, as well as to the truth of the certificate of the times of sailing and returning. *United States v. Nickerson*, 17 H. 204. . . . 458.

FLATS.

SEA.

FLORIDA.

PUBLIC LANDS, 9. 10. 14.

FOREIGN ATTACHMENT.

EQUITY, 8. 9 ; EXECUTION, 2.

FRANCE.

PUBLIC LANDS, 2. 7. 11.

FRAUD.

A question upon the evidence, whether certain deeds were obtained by fraud. *Barribeau v. Brant*, 17 H. 43 . . . 854.

BANKRUPT ; PARTITION.

GRANT.

DEED, 8. 4 ; PUBLIC LANDS, 9-12. 15-18 ; STATUTES.

GUARDIAN AND WARD.

A guardian, for the purpose of paying a debt due to his ward, agreed with a third person to exchange certain property of his own for other property of that person, and to take the title to his ward, and died before the contract was executed ; the ward cannot recover back what had been delivered. He must either look to the estate of his guardian, or complete the contract and take the property. *Yerger v. Jones*, 16 H. 30 . . . 20.

TRUST, 1.

HUSBAND AND WIFE.

A married woman is not liable to an action of covenant, though she join with her husband in warranting the land as to which she releases her claim to dower. *Griffin v. Reynolds*, 17 H. 609 . . . 725.

DEED, 1. 2 ; PARTIES.

INDIANS.

PUBLIC LANDS, 12. 17.

INDICTMENT.

CRIMINAL LAW ; PERJURY.

INSOLVENT.

A statute of Louisiana having provided that all the property of an insolvent debtor shall be deemed vested in his creditors from and after the acceptance of a cession thereof, a judgment recovered in the circuit court of the United States, after that day, gave no lien on land of the debtor, even though it was misdescribed in the schedule of his effects. *Bank of Tennessee v. Horn*, 17 H. 157 . . . 427.

RECEIVER.

INTEREST.

COURTS OF THE UNITED STATES, 12-14 ; TRUST, 2-4.

INTERPLEADER.

COURTS OF THE UNITED STATES, 19

JETTISON.

SHIPS, &c. 2.

JUDGMENT AND DECREE.

1. A decree in chancery, for the distribution of a common fund among those interested, does not conclude one who was not a party to the decree, and who was guilty of no laches. It protects the trustee who makes distribution pursuant to it; but the fund may still be followed, and his just portion reclaimed, by one not a party, nor negligent. *Williams v. Gibbes*, 17 H. 239 . . . 479. *Gooding v. Oliver*, 17 H. 274 . . . 504.
2. The effect of a decree of the court of appeals of Maryland, concerning the fund here in controversy, examined, and declared. *Ib. Ib.*
3. The parties to a real action in the supreme judicial court of Massachusetts, agreed on a statement of facts, and that the court might order a nonsuit or default and enter judgment thereon; *Held*, 1. That a nonsuit was not a bar; 2. That the agreement was not an estoppel to sue again. 3. That, upon the construction of a will on which the title depended, the demandant was entitled to recover. *Homer v. Brown*, 16 H. 354 . . . 182.
4. Every reasonable presumption is to be made in favor of a judgment or decree of a court of general jurisdiction. *Pennington v. Gibson*, 16 H. 65 . . . 30.
5. When a cause comes on for a hearing, on exceptions to a master's report, and for directions for a final decree, it is not irregular for the judge to reverse his decision, under which the reference was made, and dismiss the bill, if he thinks it ought to be dismissed. He is not obliged to enter a final decree which he believes erroneous. *Fourniquet v. Perkins*, 16 H. 82 . . . 38.
6. Where an agreement to confess judgment to foreclose a mortgage appeared on file, and a state court, at a subsequent term, granted leave to enter a judgment *nunc pro tunc*, no other court can revise this exercise of discretion. *Slicer v. Bank of Pittsburg*, 16 H. 571 . . . 301.

ACTION, 1; APPEAL; ASSIGNMENT, 1. 5; COSTS, 3; EQUITY, 4. 5. 8-10. 14; EVIDENCE, 1; EXECUTION, 1; INSOLVENT; LIEN; MANDAMUS, 3. 4; MEXICAN CLAIMS; PLEADING; PUBLIC LANDS, 13; REVENUE LAWS, 10; SUPERSEDEAS.

JURY.

DAMAGES, 7; DECEIT; LAW AND FACT; PLEADING; WAY.

KENTUCKY.

EQUITY, 2. 3.

LACHES.

ASSIGNMENT, 2; SPECIFIC PERFORMANCE.

LAPSE OF TIME.

MORTGAGE.

LAW AND FACT.

Though it may be necessary to leave the meaning and effect of a commercial corre-

spondence to a jury, when it refers to material extrinsic facts, yet the question, whether a letter of advice, which accompanied a bill, showed, on its face, a drawing against a particular consignment, was for the court. *Turner v. Yates*, 16 H. 14.... 11.

DECEIT; PLEADING; WAY.

LEASE.

COVENANT.

LEX LOCI

RECEIVER.

LIEN.

Where coördinate liens are obtained by one judgment in a State, and another in a United States court, the seizure by a sheriff, under an execution on the state judgment, gave priority to the lien of that judgment. *Pulliam v. Osborne*, 17 H. 471 ...618.

EQUITY, 1; INSOLVENT; SHIPS, &c. 4.

LIMITATIONS OF SUITS.

1. Under the 15th section of the limitation laws of Texas, if the possession of two or more persons in succession, holding in privity with each other, under title or color of title, makes out the prescribed term, the bar is complete, though no one has held for the whole required time; and the 14th section of that law, has no effect upon the 15th section. *Christy v. Alford*, 17 H. 601....717.
2. The saving clause in the New York act, limiting writs of right, does not allow for cumulative disabilities. *Thorp v. Raymond*, 16 H. 247....113.

BANKRUPT, 3; MORTGAGE; WRIT OF RIGHT.

LOG ROLLING.

CRIMINAL LAW.

LOUISIANA.

INSOLVENT; PUBLIC LANDS, 11-14; WRIT OF ERROR, 3.

MANDAMUS.

1. A *mandamus* should not be granted to compel the superintendent of public printing of the houses of congress, to place a document in the hands of the printer of the senate, instead of in the hands of the printer of the house of representatives. *United States v. Seaman*, 17 H. 225....470.
2. A writ of *mandamus* should not be issued to the secretary of the treasury commanding him to pay to a judge of a territory his salary for the unexpired term of the office from which he had been removed by the President, and another person appointed thereto. *United States v. Guthrie*, 17 H. 284....506.
3. To supersede the execution of a decree for the foreclosure of a mortgage, the mortgagor must give security for the whole amount decreed to be due; and where he failed to do so, and the court below refused to execute the decree, a peremptory *mandamus* was awarded. *Stafford v. Union Bank of Louisiana*, 17 H. 275....505.
4. The decision in the preceding case of *Stafford and Wife v. The Union Bank of*

Louisiana, again affirmed. *Stafford v. New Orleans Canal and Banking Company*, 17 H. 283 506.

MARRIAGE SETTLEMENT.

DEED, 1. 2.

MARYLAND.

JUDGMENT, &c. 2; WILL.

MASSACHUSETTS.

SEA; WRIT OF RIGHT.

MASTER AND SERVANT.

1. Though the master of a steamboat is, *prima facie*, the agent of the owner to do only what is usually done by such masters in such employment, yet different employments may and do have different usages, and thus confer on masters different powers. And where it was usual to permit persons whose employment was on board such boats, to go from place to place free of charge, a person so carried was held to be lawfully on board, and that for an injury done to him by culpable negligence in the management of the steam, the owners were liable in damages. *Steamboat New World v. King*, 16 H. 469 260.
2. The theory of the three degrees of negligence examined. *Ib.*
3. If an employment requires skill, failure to exert it is culpable negligence, for which an action lies. *Ib.*
4. Under the 13th section of the act of July 7, 1838, (5 Stats. at Large, 306,) if a person is injured on board a steamboat by the injurious escape of steam, it is incumbent on the owners, in an action against them, to prove there was no negligence. *Ib.*

METHODIST EPISCOPAL CHURCH.

Upon a bill in equity by several travelling preachers of the Methodist Episcopal Church South, in behalf of themselves and the other travelling preachers of that organization, *held*,

1. That as numerous parties had a common interest in the fund in controversy, a few might sue, representing the others.
2. That the General Conference, in 1844, had power to consent to the division of the Methodist Episcopal Church into two bodies, and that the separation was not a secession of a part of the travelling preachers from that church, but a division, in pursuance of proper authority.
3. That this division carried with it, as matter of law, a division of the common property, which belonged to the travelling preachers, as such.
4. That the removal of the sixth restrictive article, was not a condition to the enjoyment by the Church South of its share of the common fund, but to enable the General Conference to make the division.
5. That as the complainants not only represent the other travelling preachers South, but the "Book Concern" there, the share of the fund they thus represent may properly be paid over to them. *Smith v. Swormstedt*, 16 H. 288 137.

MEXICO.

MEXICAN CLAIMS; PUBLIC LANDS, 15-18.

MEXICAN CLAIMS.

Though the award of commissioners under the act of March 3, 1849, (9 Stats. at Large, 922,) passed to carry into effect the convention between the United States and Mexico, does not finally settle the equitable rights of third persons to the money awarded, yet it makes a legal title to the person recognized by the award as the owner of the claim; and if he also has equal equity, his legal title cannot be disturbed. *Judson v. Corcoran*, 17 H. 612....727.

BANKRUPT.

MISSOURI.

PUBLIC LANDS, 6-8.

MORTGAGE.

Twenty years possession under a *de facto* foreclosure of a mortgage, is a bar to redemption, even though the proceedings to foreclose were not regular, unless the mortgagor accounts for the delay, and shows that he has a valid right to redeem. *Slicer v. Bank of Pittsburg*, 16 H. 571....301.

ADMIRALTY, 2; APPEAL, 2; COVENANT; MANDAMUS, 3. 4.

NEGLIGENCE.

MASTER AND SERVANT.

NEW YORK.

LIMITATIONS OF SUITS, 2.

NONSUIT.

JUDGMENT, &c. 3.

NOTICE.

TAXES, 2.

OFFICER.

BOND.

OHIO.

CONSTITUTIONAL LAW, 1-3

PARENT AND CHILD.

ASSIGNMENT, 3.

PARTIES.

1. To a bill to charge a legacy on land of a married woman, she is a necessary party. *Lewis v. Darling*, 16 H. 1....1.

2. If this court find a case has merits, but no decree can be made for want of a necessary party, the cause will be remanded to have such party made. *Ib.*

EQUITY, 10-16; METHODIST EPISCOPAL CHURCH; PARTITION; SHIPS, &c. 1.

PARTITION.

Bill in equity to set aside a partition on the ground of fraud. The record was so defective in respect to parties and evidence, that the decree of the district court, dismissing the bill, was affirmed. *Coy v. Mason*, 17 H. 580....697.

METHODIST EPISCOPAL CHURCH.

PATENT.

1. Where a patentee invented an apparatus for breaking coal, and combined it with an apparatus for screening coal which he did not invent, and took a patent for the combination only, and afterwards took a patent for the breaking apparatus, and then surrendered both patents and took one for the breaking apparatus alone; *held*, that his describing and not claiming the breaking apparatus in his first patent, and the surrender and cancellation of the second, did not deprive him of his right to a patent for the breaking apparatus. *Battin v. Taggart*, 17 H. 74....378.
2. A question of fact as to the date when a machine was constructed. *Troy Iron and Nail Factory v. Odiorne*, 17 H. 72....376.

ACTION, 2; COSTS, 2; DAMAGES, 2-7.

PENNSYLVANIA.

CONSTITUTIONAL LAW, 5.

PERJURY.

An indictment for perjury need not refer to the act of congress which required the oath in question to be taken; it should aver the facts which constituted the occasion for taking the oath, and the court will take notice of any act of congress which required it. *United States v. Nickerson*, 17 H. 204....458.

PLEADING.

Where the facts put in issue, by an assignment of a breach of a sheriff's bond, have been once tried on an issue made up according to a law of the State, they cannot be again drawn in question; and as it is a question of law, on comparison of the records, whether they were in issue, a replication which attempts to put this question to the jury, is bad. *Chapman v. Smith*, 16 H. 114....48.

COURTS OF THE UNITED STATES, 5-8; SHIPS, &c. 1.

PLEDGE.

ASSIGNMENT, 1.

POWER.

DEVISE, &c. 1.

PRACTICE.

ABATEMENT; COSTS; EQUITY, 10-18; EXCEPTIONS; JUDGMENT, &c. 5. 6; PARTIES; STATE; UNITED STATES; WRIT OF ERROR.

PRESUMPTION.

BOND, 1; DAMAGES, 7; EVIDENCE, 4; JUDGMENT, &c. 4; SEA, 2.

PROCESS, SERVICE OF.

STATE.

PUBLIC LANDS.

1. The mere possession of public land is no title against a grantee under the United States. *Burgess v. Gray*, 16 H. 48....25.
2. The state courts have no jurisdiction to try, or give any effect to, an inchoate French or Spanish title. *Ib.*
3. The act of March 3, 1807, (2 Stats. at Large, 440,) did not grant legal titles; it only enabled claimants of inchoate titles to obtain patents. *Ib.*
4. The act of April 12, 1814, (3 Stats. at Large, 121,) confirmed only titles which had been rejected merely for want of evidence of inhabitancy on the 20th of December, 1803; and as it does not so appear, in reference to the plaintiff's title, he can take nothing under that act. *Ib.*
5. A decree, confirming an inchoate Spanish title, made by this court, on appeal in 1836, upon a petition originally filed in 1824, did not relate back so as to divest a title gained from the United States under an entry made in 1834. This would be inconsistent with the second section of the act of May 24, 1828, (4 Stats. at Large, 298.) *McCabe v. Worthington*, 16 H. 86....39.
6. Under the act of March 3, 1807, (2 Stats. at Large, 440,) a claimant of land in Missouri obtained no title to any particular tract, simply by a decision of commissioners that he had a title to an unlocated tract. A survey was necessary, in order to designate the land to which his title should attach. *West v. Cochran*, 17 H. 403....575.
7. Under the act of congress of June 12, 1812, (2 Stats. at Large, 748,) respecting town and village lots, out lots, &c., in Missouri, it was not necessary that the claimant of an out lot should have had, either under the French or Spanish authorities, or from the United States, any written recognition of his title, or any public survey; nor was he required by the supplementary act of 1824, (4 Stats. at Large, 65,) to present the evidence of his claim and have it recognized. He might do so, and thus estop the United States and those claiming under them by subsequent grant; but he might also rely on proving the facts, made needful to his title by the act of 1812, through parol evidence, if his possession should be disturbed. *Guitard v. Stoddard*, 16 H. 494....275.
8. Under the acts of 1812, (2 Stats. at Large, 748,) and 1824, (4 Stats. at Large, 65,) concerning town and village lots in Missouri, it was not competent for the recorder to give a certificate of confirmation in 1839, and thereby divest a title already acquired under the United States. *Gamache v. Piquignot*, 16 H. 451....254.
9. The grant of lands in Florida by the king of Spain to the duke of Alagon, whether it takes date from the royal order of December 17, 1817, or from the grant of February 6, 1818, and whether the title was held by him or his assignee, is annulled by the treaty between the United States and the king of Spain, signed February 22, 1819, by virtue of the declaration to that effect, made by the President of the United States, on presenting the treaty for an exchange of ratifications, and assented to by the king in writing, and again ratified by the senate of the United States. *Doe v. Braden*, 16 H. 635....327.
10. Whether the king of Spain had power thus to annul a grant, is a question, foreclosed, in every judicial tribunal of the United States, by the action of the President and senate, treating with him as having that power. *Ib.*

11. A grant made by the French authorities in Louisiana in 1722, unaided by a survey, and the calls in which were too vague and indeterminate to separate any particular tract of land from the public domain, will not support an action of ejectment. *Denise v. Ruggles*, 16 H. 242....109.
12. The title of Dubuque, under an alleged grant from the Fox Indians, confirmed by the Spanish governor of Louisiana, *held* to be merely a permit to work mines, and occupy for that purpose the needful land. *Chouteau v. Molony*, 16 H. 203....87.
13. Under the fifth section of the act of March 3, 1811, (2 Stats. at Large, 663,) prescribing the terms on which proprietors of contiguous lands, on a stream, in Louisiana, could obtain titles to adjacent back lands belonging to the United States, where each of two proprietors could not obtain his full quantity by reason of the directions of their side lines, a division between them of such back land, made, in good faith, by the principal deputy surveyor of the proper district, under the superintendence of the surveyor of public lands south of the State of Tennessee, was final and conclusive upon their respective rights, and cannot be disturbed by any court of justice. *Haydel v. Dufresne*, 17 H. 23....347.
14. The principles of the decisions of this court concerning titles in Louisiana and Florida, examined, and distinctions between those titles and titles in California, stated. *Fremont v. United States*, 17 H. 542....667.
15. A grant by the Mexican governor of California, of ten square leagues of land within a certain district of country, in consideration of meritorious services of the grantee, conferred an equitable right to that quantity of land within that district, valid as against the Mexican government, and consequently as against the United States, though the particular tract had not been designated by a survey, at the time of the cession to the United States; and the particular land to which this title is to attach, must be ascertained by a survey made under the authority and in the mode provided by the laws of the United States. *Ib.*
16. The force and effect of the conditions subsequent, annexed to this grant, considered. *Ib.*
17. By the laws of Mexico, an Indian was capable of receiving a grant of land, and holding it, with the same rights as a white person. *United States v. Ritchie*, 17 H. 525....656.
18. Under the laws of Mexico, the public authorities of California had power to make grants of mission lands. *Ib.*

COURTS OF THE UNITED STATES, 16-18.

QUIETING TITLE.

EQUITY, 2. 8.

RECEIVER.

1. The appointment of a receiver, under a creditor's bill, filed in a court of chancery of the State of New York, against one who was a resident of that State, did not vest in the receiver the debtor's claim against a foreign government. *Booth v. Clark*, 17 H. 322....524.
2. The nature and extent of the title of a receiver, and the operation of foreign bankrupt and insolvent laws examined. *Ib.*

RECEIVERS OF PUBLIC MONEYS.

BOND; EVIDENCE, 8.

RECORD.

WRIT OF ERROR, 3.

REGISTRATION.

CONSTITUTIONAL LAW, 4.

REPLEVIN.

COURTS OF THE UNITED STATES, 9. 10.

RESCISSION OF CONTRACT.

EQUITY, 12.

REVENUE LAWS.

1. Under the tariff act of 1846, (9 Stats. at Large, 42,) shawls of worsted, worsted and cotton, silk and worsted, silk, barege, merino, mousseline de laine, and worsted and silk scarfs, are wearing apparel, and subject to a duty of thirty per centum *ad valorem* under schedule C. *Maillard v. Lawrence*, 16 H. 251....115.
2. The sixty-sixth section of the collection act of 1799, (1 Stats. at Large, 677,) is not repealed by the nineteenth section of the tariff act of 1842, (5 Stats. at Large, 565,) nor by the eighth section of the tariff act of 1846, (9 Stats. at Large, 43.) *United States v. Sixty-seven Packages of Dry Goods*, 17 H. 85....383.
3. Repeals, by implication, of revenue and collection laws, not favored. *Ib.*
4. The decision in the next preceding case, again affirmed. *United States v. Nine Cases of Silk Hats*, 17 H. 97....390.
5. The decision in the two preceding cases, affirmed. *United States v. One Package of Merchandise*, 17 H. 98....390.
6. The decision in the three preceding cases affirmed. *United States v. One Case of Clocks*, 17 H. 99....391.
7. Additional duties, by way of penalty, levied pursuant to the eighth section of the tariff act of 1846, (9 Stats. at Large, 43,) are not distributable to any officers of the customs. *King v. Maxwell*, 17 H. 147....418.
8. Though the act of February 11, 1846, § 3, (9 Stats. at Large, 3,) applies, in terms, only to the additional duties levied under the seventeenth section of the tariff act of 1842, yet those levied under the eighth section of the tariff act of 1846, are only substitutes therefor in certain cases, and to be governed by the same rule as to distribution. *Ib.*
9. Under the sixteenth and seventeenth sections of the tariff act of 1842, (5 Stats. at Large, 563-4,) the power of the government appraisers was not terminated by returning an appraisement to the collector; when they found it was questioned, they had a right to reconsider it, and for this purpose to call on the importer to produce his correspondence, and he could not, by taking an appeal, exempt himself from the duty of producing it. *Bartlett v. Kane*, 16 H. 263....122.
10. The decision of the government appraisers is final, if not appealed from; or if an appeal, having been taken, is waived. *Ib.*
11. Additional duties, by way of penalty, levied under the eighth section of the tariff act of 1846, (9 Stats. at Large, 43,) do not make a part of the drawback, to be returned on exportation. *Ib.*
12. The twentieth section of the tariff act of 1842, (5 Stats. at Large, 565,) was not designed to levy duties, but to check fraudulent evasions, or prevent doubts in the execution of the revenue laws; and it is not repealed by the tariff act of 1846, (9 Stats. at Large, 42.) *Stuart v. Maxwell*, 16 H. 150....61.
13. There is no act of congress which enables a collector of customs to act as an inspector, and claim compensation therefor. *Stewart v. United States*, 17 H. 116. . 403.

14. Duties collected in California between February 3, 1848, (the date of the treaty of peace,) and November 13, 1849, (when the collector entered on the duties of his office,) were not illegally exacted, and cannot be recovered back by the importer *Cross v. Harrison*, 16 H. 164....66.

REVIEW.

BILL OF REVIEW.

RHODE ISLAND.

WAY.

SALE.

BANKRUPT, 1; EQUITY, 8. 9; TAXES, 2.

SEA.

1. The title of the city of Boston to a part of the shore of the sea, within its limits, examined. *City of Boston v. Lecraw*, 17 H. 426....590.
2. Though the proprietor of the shore, in Massachusetts, may build thereon, and thus exclude the public from its use for navigation when covered by the tide, until he does so the public may lawfully so use it, such use is not adverse, and lays no foundation for a presumption of a dedication of the land to that use. *Ib.*

SECRETARY OF THE TREASURY.

MANDAMUS, 2.

SET-OFF.

EQUITY, 5.

SHERIFF.

In a proceeding against a sheriff for not making the money out of goods returned as seized, he may show, in defence, that the goods did not belong to the debtor, but to a third person. *Chapman v. Smith*, 16 H. 114....48.

SHIPS AND SHIPPING.

1. *Prima facie* the consignee of goods under a bill of lading, has the legal title and a beneficial interest in the goods, and may sue the carrier for the non-delivery thereof. *Lawrence v. Minturn*, 17 H. 100....392.
2. Powers of the master, respecting jettisons, stated. *Ib.*
3. There is no implied warranty by the owners, that the vessel shall prove sufficiently buoyant to carry cargo placed on deck under a contract with the shipper. He takes the risk of perils, arising solely from that place of stowage in which he agreed, his property should be carried. *Ib.*
4. Under a charter-party for a voyage from London direct, or thence to Cardiff in Wales, to load for port or ports on the Pacific, where the vessel was to be employed between such ports as the charterers might elect, for the full term of fifteen months, with a privilege to the charterers to extend the time to twenty-four months, the hire being at the rate of \$2,000 a month, payable in New York, semiannually; *held*, the owners had not a lien on the outward cargo from Cardiff to the Pacific, for the first six months' hire of the vessel, which became due at New York before the arrival of the vessel at the port of delivery in the Pacific. *Raymond v. Tyson*, 17 H. 53....362.

COLLISION; MASTER AND SERVANT; TAXES, 1.

SIDEWALK.

WAY.

SLAVES.

A question of fact respecting the ownership of slaves. *Amis v. Myers*, 16 H. 492
274.

SPAIN.

PUBLIC LANDS, 2. 5. 7. 9. 10. 12.

SPECIFIC PERFORMANCE.

Specific performance refused, on the ground of laches, and non-performance by the complainants, and loss of title. *Boone v. Missouri Iron Company*, 17 H. 840.... 587.

STATE.

1. A judgment having been recovered in the highest court of a State by the treasurer of the State, suing *ex officio*, the citation to appear to a writ of error, under the 25th section of the judiciary act of 1789, (1 Stats. at Large, 85,) should be served on the treasurer, and not on the governor and attorney-general. *Poydras de la Lande's Heirs v. Treasurer of the State of Louisiana*, 17 H. 1....333.
2. The tenth rule of this court applies only to cases in which a State is a party on the record. *Ib.*

CONSTITUTIONAL LAW, 1-3; COURTS OF THE UNITED STATES, 1. 3. 5.

STATE COURT.

COURTS OF THE UNITED STATES, 1-5; JUDGMENT, &c. 6; LIEN; PUBLIC LANDS, 2.

STATUTES.

Rules of construction of public grants, especially those made to corporations, in derogation of common right. *Ohio Life Insurance and Trust Company v. Debolt*, 16 H. 416....230.

CONSTITUTIONAL LAW; COURTS OF THE UNITED STATES, 4; FERRY; PERJURY; REVENUE LAWS, 2-6.

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1844, June 17, Missouri Land Claims. 5 Stats. at Large, 676.

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1849, March 3, Treaty with Mexico. 9 Stats. at Large, 393.

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1849, March 3, Revenue, (California.) 9 Stats. at Large, 400.

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1849, March 3, Government of Minnesota. 9 Stats. at Large, 403.

s. 9, p. 406.....United States *v.* Guthrie, 17 H. 284.....506

1850, March 29, Convention with Brazil. 9 Stats. at Large, 422.

Lewis *v.* Bell, 17 H. 616.....731

1850, July 29, Conveyances of Vessels, &c. 9 Stats. at Large, 440.

Hays v. Pacific Mail Steamship Co. 17 H. 596.....718

1850, September 9, Government of New Mexico. 9 Stats. at Large, 446.

a. 10, p. 449.....United States v. Guthrie, 17 H. 284.....506

1850, September 9, Government of Utah. 9 Stats. at Large, 453.

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1851, March 3, Appropriations. 9 Stats. at Large, 598.

p. 606, Convention with Brazil.

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1851, March 3, California Land Claims. 9 Stats. at Large, 631.

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1852, July 3, Convention with Brazil. 10 Stats. at Large, 11.

Lewis v. Bell, 17 H. 616.....731

1852, August 26, Public Printing. 10 Stats. at Large, 80.

United States v. Seaman, 17 H. 225.....470

1852, August 30, Security of Passengers in Steamers. 10 Stats. at Large, 61.

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1852, August 31, Appropriations. 10 Stats. at Large, 76.

a. 12, p. 99.....United States v. Ritchie, 17 H. 525.....656

1853, February 26, Frauds on Treasury. 10 Stats. at Large, 170.

Marshall v. Baltimore and Ohio Railroad Co. 16 H. 314..158

1853, March 2, Government of Washington Territory. 10 Stats. at Large, 172.

s. 9, p. 175.....United States v. Guthrie, 17 H. 284.....506

1853, March 3, Survey of Lands in California. 10 Stats. at Large, 244.

Fremont v. United States, 17 H. 542.....667

1854, March 1, Preëmption, (California.) 10 Stats. at Large, 268.

Fremont v. United States, 17 H. 542.....667

1854, May 30, Government of Nebraska and Kansas. 10 Stats. at Large, 277.

a. 9, p. 280.....United States v. Guthrie, 17 H. 284.....506

STEAMBOAT.

MASTER AND SERVANT.

SUPERINTENDENT OF PUBLIC PRINTING.

MANDAMUS, 1.

SUPERSEDEAS.

A *supersedeas* of a decree in chancery can only be had by giving a bond, pursuant to the 23d section of the judiciary act of 1789, (1 Stats. at Large, 85.) *Adams v. Law*, 16 H. 144....57.

SURETY.

BOND ; EVIDENCE, 3.

TAXES.

1. An ocean steamer owned and registered in New York, and regularly plying between Panama and San Francisco, and ports in Oregon, remaining in San Francisco no longer than is necessary to land and receive passengers and cargo, and in Benicia only for repairs and supplies, is not subject to taxation by the State of California. *Hays v. Pacific Mail Steamship Company*, 17 H. 596....713.
2. Under the act of May 26, 1824, § 2, (4 Stats. at Large, 75,) notice of a tax sale "once in each week for twelve successive weeks," is not given, unless the first notice preceded the sale eighty-four days. *Early v. Doe*, 16 H. 610....317.

CONSTITUTIONAL LAW, 1-3. 5.

TENNESSEE.

CONSTITUTIONAL LAW, 4.

TERRITORIAL COURTS.

MANDAMUS, 2.

TERRITORY.

MANDAMUS, 2.

TEXAS.

LIMITATIONS OF SUITS, 1. 3.

TREASURY TRANSCRIPT.

EVIDENCE, 3.

TREATY.

MEXICAN CLAIMS ; PUBLIC LANDS, 9. 10.

TRIAL.

WRIT OF ERROR, 1. 3.

TRUST.

1. On a bill against the trustees under a will, the court will not reëxamine the accounts

- of one of them as administrator *de bonis non*, nor of another as guardian. *Barney v. Saunders*, 16 H. 535 288.
2. Under the circumstances of this case, it was held that yearly rests in the accounts of trustees were proper. *Ib.*
 3. A trustee who has made usurious interest, must account for it to his *cestui que trust*. *Ib.*
 4. Trustees, under a duty to invest on good security, who suffer moneys to lie on deposit at a banker's, payable on demand with interest, longer than was needful to obtain a proper investment, must bear any loss arising from the failure of the banker. But not of sums recently deposited, as they deposited their own funds. *Ib.*

GUARDIAN AND WARD ; JUDGMENT, &c. 1.

UNITED STATES.

In a suit between Florida and Georgia, to settle a part of the boundary line between those States, the United States, as a proprietor and grantor of lands in the disputed territory, having an interest in the question of the location of the line, the attorney general, on filing an information, had leave to adduce evidence, written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States. *Florida v. Georgia*, 17 H. 478 621.

VENDOR AND PURCHASER.

EQUITY, 8. 9.

VIRGINIA.

ACTION, 3.

WARRANTY.

EQUITY, 8. 9 ; EVIDENCE, 1 ; SHIPS, &c. 3.

WATER.

DEED, 3. 4.

WAY.

The act of Rhode Island, which requires towns to keep highways, &c., in repair, &c., applies to the sidewalks of cities, and to obstructions occasioned by snow and ice thereon ; and it is a question for the jury, whether, having regard to the amount and kind of use of the way, it was reasonably safe and convenient. *City of Providence v. Clapp*, 17 H. 161 429.

WILL.

The statute of Maryland, passed in 1850, concerning the effect of wills upon after-acquired lands, did not apply to a will executed before the first day of June, 1850 the testator having survived until after that day. *Curroll v. Carroll's Lessee*, 16 H. 275 128.

DEVISE, &c.

WITNESS.

EVIDENCE, 1. 2.

WRIT OF ERROR.

1. It often happens that a right may be asserted in the course of a trial upon one of

two grounds, both of which cannot exist; and though it is the duty of the court to guard against surprise in this respect, yet this is a matter of practice, and of discretion, and not ground for a writ of error. *Turner v. Yates*, 16 H. 14....11.

2. A writ of error was dismissed, 1. Because it did not name all the parties to the judgment. 2. Because the bond was given to a person not a party to the record. 3. Because the citation was issued to a person who was not a party to the record. *Davenport v. Fletcher*, 16 H. 142....57.
3. Under the practice in Louisiana, it is not proper to spread upon the record any other evidence than what relates to the points of law raised at the trial, and intended to be reviewed on error; and this court will intend that the record contains all the evidence which bore on those points. *Arthurs v. Hart*, 17 H. 6....338.

COSTS; COURTS OF THE UNITED STATES, 1. 2; EXECUTION, 2; JUDGMENT, &c. 6; STATE.

WRIT OF RIGHT.

The revised statutes of Massachusetts, which abolished writs of right, did not prevent such writs from being brought in the circuit court of the United States, if the seisin of the demandant was within the limitation of time allowed by the laws of that State for the recovery of land. *Homer v. Brown*, 16 H. 354....182.

LIMITATIONS OF SUITS. 2.

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